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OF

PRECEDENTS

FROM THE

BEST MODERN MANUSCRIPT COLLECTIONS,

AND

Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS,

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

BY

THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN CONTINUATION OF THE WORK OF THE LATE

W. M. BYTHEWOOD, Esq.

VOL. X.

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ERRATA ET ADDENDA.

Page 231, *line* 4 *of note, after the words* "judgment debts," *add* "or rather from the lien of judgments obtained in adverse suits, for it seems to be doubtful whether this doctrine extends to judgments confessed.—*See* 1 Adolph. & Ellis, 293."

Page 268, *line* 9 *of note* (*text type*), *after the words* "that may have been entered into," *add* "with power also to enter into special conditions and stipulations relative to title or otherwise."

Similar addition, page 269, *line* 10, *after the word* "advisable."

Page 271, *line* 19, *after the words* "executrix and executors in trust of this my will," *add* "and I nominate and appoint the said executrix and executors and the survivors and survivor of them to be guardians."

Page 282, *line* 11 *from bottom, after the word* "renounce," *add* "or be unable to act in."

Page 568, *lines* 13 *and* 14, *dele* "in the joint names of herself and remainder-man."

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I. WHO MAY MAKE WILLS.

WHO MAY MAKE WILLS.

Stat. 34 Hen. 8, c. 5.

THE general testamentary power over freehold lands (*a*) was originally given by the statute of 32 Hen. 8, c. 1, into the precise import of which it is now unnecessary to inquire, as it was quickly followed by the explanatory act of 34 & 35 Hen. 8, c. 5, which, after reciting the former statute, enacted, "That all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple, in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of any rents or services incident to any reversion or remainder, shall have full and free

Persons having an estate or interest in lands in fee enabled to devise.

(*a*) Throughout the present dissertation the word "lands" is frequently used in a general sense, synonymously with real estate.

liberty, power, and authority to give, dispose, will, or devise to any person or persons, (except bodies politic and corporate) by his last will and testament in writing as much as in him of right is or shall be, all his said manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived out of the same, or out of any parcel thereof, at his own free will and pleasure."

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By s. 14, it is provided, that wills or testaments made of any manors, &c., by any woman covert, or person within the age of 21 years, idiot, or by any person of nonsane memory, should not be taken to be good or effectual in law. This clause did not create any disability that was unknown, nor does it comprise all that were known to the common law, but seems to have been dictated by an apprehension that the general terms of the act of 32 Hen. 8, might have had the effect of removing pre-existing disabilities according to the construction given to the nearly contemporary statute of jointures, 27 Hen. 8, c. 10, (*ante*, Vol. 9, p. 92). Hence, all the specified disqualifications extend equally to the bequeathing of personal estate, except that infants of a certain age, namely, males of fourteen, and females of twelve, may dispose by will of personalty; *Bishop* v. *Sharpe*, 2 Vern. 469; *Whitmore* v. *Wild*, 2 Ch. Rep. 382; *Hyde* v. *Hyde*, 2 Eq. Ca. Ab. 283, *S. C.* Pre. Ch. 366; and such a will is valid, notwithstanding that the testator or testatrix afterwards lives to majority without confirming it. *Hinckley* v. *Simmons*, 4 Ves. 160. On the other hand, infants of every age are under an incompetency to aliene any portion of their property, real or personal, by deed. The effect produced by the ability to dispose in the one case, and the inability in the other, may be illustrated by the following supposititious case:—A., an infant, possessed of a leasehold for years, executes a deed granting an underlease to B., and afterwards dies, during infancy, having, by his will made after the age of fourteen, bequeathed the property to C. The underlease would be absolutely void against C., the legatee, though the will, under which he claimed, was made during the very infancy which vitiated the underlease. It would be more easy to find technical reasons for this distinction than to defend it upon principles of general reasoning.

Exception as to *femes covertes*, infants, lunatics, and idiots.

Infants may bequeath personal estate.

The disability of coverture differs essentially from those of infancy, idiocy, and lunacy. It does not arise from natural infirmity, but is the creature of civil policy, and may be dispensed with at the pleasure of the contracting or disposing parties, so far, at least, as the *jus disponendi* is concerned; while the contrary has been decided with respect to infancy, which alone, of the other enumerated disabilities, could admit of any argument being raised on the subject. *Hearle* v. *Greenbank*, 3 Atk. 897, *S. C.* 2 Ves. sen. 298.

A woman, whose husband has been banished for life by act of Parliament, may dispose, by will, of her real and personal estate; for, as he is

Wife of an exile.

WHO MAY MAKE WILLS.

civilly defunct, she is restored to the rights and privileges of discoverture. *Countess of Portland* v. *Prodger*, 2 Vern. 104. And where a felon is transported for a definite term of years, his marital rights (and, therefore, it should seem his wife's conjugal disabilities) are suspended for that period. See *Ex parte Franks*, 1 Moore & Scott, 11.

Infants may devise by custom.

Infants may devise real estate by special custom, but it must prescribe some definite and reasonable age; for a custom, authorizing the making of a will by persons too young to be capable of exercising a discretion, would be no less absurd than one which should empower lunatics or idiots to devise their property. Fourteen, it seems, would be considered a proper age. 2 Anders. 12.

Testamentary appointment of guardians may be made by infants.

The disability of infancy has been expressly taken away, in regard to the paternal appointment of testamentary guardians, by stat. 12 Car. 2, c. 24, s. 8; which has enabled any father within the age of twenty-one, or of full age, who shall leave any child under twenty-one, and not married, by deed or will, in the presence of two witnesses, to dispose of the custody of such child or children, during such time as he or they shall continue under twenty-one, or any less time, to any person or persons other than popish recusants; and it gives to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage. *Vide ante*, Vol. 2, p. 395.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising directly; *Bedell* v. *Constable*, Vaugh. 178; see also 2 P. W. 102; and it is observable, that though the power of appointing guardians does not extend to infant children who are married at the father's death, yet, if then unmarried, the guardianship is not afterwards determined by marriage. *Earl of Shaftsbury's case*, cit. 3 Atk. 625. The statute has been held not to interfere with the lord's right to the guardianship of his infant copyhold tenant. *Clench* v. *Cudmore*, 3 Lev. 395.

Wills of idiots and lunatics.

The will of an idiot is of course void. Dyer, 143 b. The validity of a lunatic's will depends on the state of his mind at the time; for, if made during a lucid interval, it will be good. *Beverley's case*, 4 Rep. 123 b. Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may of course destroy testamentary power. See Swinb. 133.

Persons deaf and blind.

A person who has been from his nativity blind, and deaf and dumb, (the dumbness being, in fact, a necessary consequence of the deafness), is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind. Blindness or deafness alone, however, produces no such incapacity. Indeed, it has even been held that a will need not be read over to a blind testator, previously to its execution; *Longchamp* d. *Goodfellow* v. *Fish*, 2 Bos. & Pul. New Rep. 415; though, it is almost superfluous to observe, that, in proportion as

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the infirmities of a testator expose him to deception, it becomes more imperatively the duty, and should be more anxiously the care, of all persons engaged in the transaction, to be prepared with unexceptionable proof that no imposition has been practised. The reader who wishes to acquaint himself with the circumstances of cases of this description, will find them numerously scattered through the ecclesiastical reports.

Subsequent confirmation of will originally void.

A will made during any personal disability, of course is not validated by the fact of the testator having outlived it, unless the removal of the disability were followed by some act of confirmation or adoption, amounting in law to a publication. 2 Salk. 238; 1 Eq. Ca. Ab. 171, pl. 3 (*a*).

In the ecclesiastical Court, the delivery by a widow of an instrument executed during coverture to the custody of another, as the will of the depositor, has been held to be a sufficient publication of a will of personal estate. *Miller* v. *Brown*, 2 Haggard, 209.

Devises by aliens.

A devise of lands by an alien is at least voidable, (see Shep. Touchst. 404), the crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien, during his life. Until office, the lands of an alien remain in him, having all the qualities incidental to estates of that description. On which ground it has been held, that an alien tenant in tail in possession may suffer a common recovery, which will be effectual to bar the issue in tail and remainders; 4 Leon. 84; and, by parity of reasoning, the will of an alien will vest his defeasible title in a devisee; see Shep. Touchst. 404; though it is clear, that, if he dies intestate, the land will escheat to the king or other lord *pro defectu tenentis*, without any inquest of office; because an alien can have no heirs. Co. Lit. 2. b.

Devises by traitors and felons.

Persons attainted of high treason are clearly incompetent to devise their lands, since, by several old statutes, (*vide ante*, Vol. 4, p. 186), the real estates of the traitor are, by the attainder, *ipso facto* vested in the king.

The lands of persons attainted for petty treason and felony formerly escheated to the king or other feudal lord, by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable only, as in the case of an alien, Shep. Touch. 404; and such is still the rule as to persons not entitled to the benefit of the stat. 54 Geo. 3, c. 145, stated *ante*, Vol. 4, p. 187; which has abolished the corruption of blood in all cases of attainder, except for petty treason and murder, or for counselling, procuring, and abetting those offences.

It is thought by some gentlemen, in opposition to the general opinion,

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(*a*) As to republication, *vide post*, Sect. ix.

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that this statute enables persons convicted of any other than the excepted offences, to alien their real estate by will. The words are certainly large, but the Legislature could hardly have intended to leave in the offender the power of disposing of his lands, not only by will, but also by a conveyance *inter vivos;* for, the concession of the one necessarily involves the concession of the other. The act seems to assume, though it does not declare, the felon to be civilly dead. See further, as to the law of escheat and forfeiture on conviction and attainder for felony, *ante*, Vol. 4, p. 187.

DEVISABLE ESTATES AND INTERESTS.

II. WHAT MAY BE DEVISED OR BEQUEATHED.

What may be devised or bequeathed.

Generally speaking, the testamentary power extends to all interests in real and personal estate, which at the decease of the testator would, if not thus disposed of, vest in his general real or personal representatives, whether the testator is the legal or beneficial owner only, or unites in himself both these characters. Tried by this rule, it is obvious that a devise by a joint tenant of real or personal estate is necessarily void in the event of the testator dying in the life-time of the co-tenant, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator of the testator in case he had died intestate. Co. Litt. 185 a. If, on the other hand, the testator survives his companion in the tenancy, the efficiency of the devise or bequest depends on the nature of the property; if it were a freehold interest, the estate devolving by survivorship would not pass by the will, the testator not having a sole or devisable estate when he made it; and, by parity of reasoning, any divided part or share which might after the will have been allotted to the testator on a partition of the property, would not pass thereby. *Swift* d. *Neale* v. *Roberts*, 1 Sir W. Blackst. 476; S. C. 3 Burr. 1488. But this reasoning, it is obvious, does not apply to personal estate; a future interest in which devolving by survivorship, or acquired by partition, would, like all other after-acquired personalty, pass by a general or residuary bequest.

Joint estates not devisable.

Trust estates commonly held in joint tenancy.

The doctrine respecting joint tenancies comes under consideration in practice, most frequently in relation to trust estates, which are commonly vested jointly in a plurality of persons. The testacy or intestacy of any trustee who leaves a surviving co-trustee, it is unnecessary to inquire into; but, supposing him to have been sole trustee at his death, his will, if he left one, should be examined, in order to ascertain whether it contains a devise of trust estates, or one capable of operating on them (*a*). If the interest vested in the trustee were of a freehold nature, it would also be

(*a*) *Vide post*, Sect. xi. pl. 2.

necessary to ascertain that the trust estate had vested in him solely by survivorship, or otherwise, when he made his will.

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Executory interests, when devisable.

An executory interest in real or personal estate is disposable by will, if, from the nature of the contingency, the interest does not cease with the life of the testator, in other words, if it is descendible or transmissible. This doctrine was recognised in regard to real estate in the case of *Goodtitle* v. *Wood*, Willes, 211, cited 3 Durn. & East, 94, and was finally established in the case of *Roe* d. *Perry* v. *Jones*, 1 H. Bl. 30; S. C. in B. R. 3 Durn. & East, 88, where an estate was devised by will (on failure of limitations to the younger sons of A.) to the only son of A. in fee, in case he should have but one son who should live to attain twenty-one. A. had an only son, B., who, in the life-time of his father, after he had attained his majority, made a will, devising all his estate in possession or reversion; and the question was, whether this will operated to pass the executory use which B. had during his father's life-time, and it was held that it did. Lord *Kenyon* distinguishing between such an interest and a mere possibility, like that which an heir has from his ancestor. Mr. Justice *Buller* observed, that if it was such an interest as was descenddible, it was also devisable, as they must both be governed by the same principle. The converse of the proposition of the learned Judge is equally true; namely, that an interest which is not transmissible cannot be devised. An instance of this kind occurred in the case of *Doe* v. *Tomkinson*, 2 M. & S. 165, where a testator devised his real estate to A. and B. and the survivor of them, and to be disposed of by the survivor as she might, by will, devise. A. survived B., having in the life-time of B. made a will, devising her contingent interest; but which was held not to pass, on the ground that the person who was to take was not in any degree ascertainable before the contingency happened. The reasoning of the Court merely assigns a ground for the decision which is common to executory interests of every description, for it is the uncertainty who will become entitled that renders the interest contingent. The true ground it is submitted is, that the contingency, depending on survivorship, necessarily takes effect in the lifetime of the testator, and therefore cannot be the subject of a devise, which is inoperative until death. If this be the correct reason, it would follow that, in the case of a limitation to several persons, and the heirs of the one first dying, such an interest would be devisable, because it differs from the limitation in *Doe* v. *Tomkinson* in no other respect than in regard to the nature of the contingency, and yet the conclusion that such an interest may be disposed of by will, it is submitted, is indisputable.

Right of action not devisable.

A right of action is not devisable. Thus it is clear that a reversion in fee expectant on an estate tail, which has been discontinued by the act of the tenant in tail, cannot be devised. *Baker* v. *Hacking*, Cro. Car. 387,

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408. This point was adverted to in the recent case of *Doe* d. *Cooper* v. *Finch*, 1 Nev. & Ryl. 130, the arguments in which enter largely into the discussion of some important general principles of law, and may be perused with advantage.

So as to rights of entry.

And the same doctrine is applicable to rights of entry. The point was much discussed in the case of *Goodright* v. *Forrester*, 8 East, 564, 1 Taunt. 587, where A. being tenant for life, with reversion to B. in fee, A. levied a fine *come ceo*, &c.; after which B. devised his reversion, and the validity of the devise of course depended on the doctrine in question. The case was eventually decided on another point, after an energetic protest from Sir *J. Mansfield*, C. J., against the doctrine affirming the invalidity of the devise; but which seems, by the better opinion, to be sound law. Such, it is evident, was the opinion of *Eyre*, C. J., in the case of *Cave* v. *Holford*, 3 Ves. 669; of Lord *Eldon*, in *Attorney-General* v. *Vigor*, 8 Ves. 282; and of the Court of King's Bench, in the more recent case of *Doe* d. *Souter* v. *Hale*, 2 Dowl. & Ryl. 38: and Lord *Eldon* moreover intimated an opinion, that a will made during *disseisin* is invalid, though the testator dies seised, which certainly appears to be more consistent with principle than the contrary doctrine advanced in *Bunker* v. *Cooke*, Salk. 237, on the ground that a disseisee, after re-entry, is by relation seised *ab initio*.

Conditions not devisable.

A condition is not devisable, the rule being that the heir alone can take advantage of a condition. By the effect of this doctrine, it should seem, a devise made by a mortgagor before the breach of the condition, *i. e.* before the non-payment of the mortgage debt, would be invalid at law, and the heir would be entitled to tender the money, and avail himself of the benefit of the condition. See *Anon.* 2 Ch. Cas. 88. But the doctrine would not apply where the proviso for redemption was framed, not in the form of a condition, but of an agreement to convey, which is now the more usual, and seems upon the whole to be the preferable, mode of framing it.

After-acquired freehold interests not devisable.

A will, disposing of a freehold interest in real estate, operates in the nature of a conveyance, and consequently extends only to hereditaments belonging to the testator when he makes the devise. This rule was early established, in relation as well to devises by custom, as to devises under the statutes of Henry 8, which shews that it did not arise from the penning of those statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extends no less to equitable than to legal interests. If, therefore, a testator devises all the real estate of which he shall be seised at the time of his decease, and after the making of his will he purchases lands in fee, such lands, whether they are conveyed to the testator himself, or to a trustee for him, will not pass by the will; but the legal inheritance in the former case,

and the equitable inheritance in the latter, will descend to the heir-at-law. *Bunker* v. *Cooke*, 1 Salk. 237; S. C. in Dom. Proc. 3 B. P. C. Toml. ed. 19; *Longford* v. *Pitt*, 2 P. W. 629.

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Where a testator has only the equitable interest in the devised lands, when he makes his will, and subsequently acquires the legal estate, the estate so acquired will descend to the heir, and the equitable interest will pass to the devisee, for whom the heir will be a trustee. If, on the other hand, the testator were seised only of the legal estate at the time of the execution of his will, and afterwards acquired the equitable interest (as where, being a mortgagee in fee, he purchases the equity of redemption), the devisee would be a trustee of the legal estate, which he derived through the will for the heir-at-law, to whom the equitable inheritance descended. *Strode* v. *Lady Falkland*, 3 Ch. Rep. 188. Cases of the former description frequently occur where a man contracts to purchase hereditaments in fee, then devises them, and, subsequently to the execution of his will, takes a conveyance of the legal estate, and then dies without re-publishing his will; *Greenhill* v. *Greenhill*, Pre. Ch. 320; *Green* v. *Smith*, 1 Atk. 572; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 494; *Foley* v. *Percival*, 4 B. C. C. 420; *Capel* v. *Girdler*, 9 Ves. 509; *Holmes* v. *Barker*, 2 Madd. 462; the testator being equitable owner under the contract, his interest passes by the will to the devisee, whose equitable title the heir will be bound to clothe with the legal estate. Notwithstanding this doctrine, however, it is always better to re-execute the will after the completion of a contract for purchase, not only for the purpose of avoiding the inconvenience attending the severance of the legal and equitable interests, aggravated possibly by the devolution of the former to an infant, or a *feme covert;* but also because it frequently becomes questionable whether the conveyance has not been framed in such a manner as to modify the equitable ownership, and thereby revoke the devise. The ordinary uses to prevent dower have this effect, if the terms of the contract be merely that the estate shall be conveyed to the purchaser in fee, without adding the usual words, "or to such other uses as he shall direct." (*Vide post*, Section viii.)

Devises by persons having equitable freehold.

If the testator dies, pending the completion of the contract, the devisee of the purchased land (or the heir if it is undevised), is entitled to call upon the executor or administrator to pay the purchase-money (if unpaid), out of the personal estate. The personal representative might repel this demand, by shewing that, from the defective state of the title or other circumstances, the contract was not obligatory on the deceased purchaser at the time of his death. If such were the fact, of course there would be no conversion, as between the real and personal representatives; and it would be begging the question to say, that the devisee or heir might elect to accept the title with its defects; for, unless the deceased purchaser was bound, his heir or devisee has derived from him no interest entitling him

Effect where the testator dies pending a contract for purchase.

DEVISABLE ESTATES AND INTERESTS.

to any voice in the matter. It is equally clear that the heir or devisee is not entitled to have the money laid out in the purchase of another estate. *Broome* v. *Monck*, 10 Ves. 597; see also *Attorney-General* v. *Day*, 1 Ves. sen. 218. But, if the contract is abandoned, from circumstances arising subsequently to the purchaser's decease, as from his estate not affording the means of paying the purchase-money in time to hold the vendor to the contract, the devisee or heir is entitled to the money. *Whittaker* v. *Whittaker*, 4 B. C. C. 30. To prevent all questions of this nature, it would be well if a clause were always appended to a devise of lands contracted to be purchased, disposing of the money in the event of the contract not being carried into effect. It seldom happens that the testator intends his bounty to depend on any such contingency; consequently, the rule which makes the efficiency of the contract necessary to the validity of the devise defeats the intention. If the contract which the testator is alleged to have entered into be a parol contract, its operation in converting the property would depend upon the fact of its having been rendered enforceable by part performance. See *Potter* v. *Potter*, 1 Ves. sen. 437. Supposing this fact to be established in favour of the real representative, a further question would arise between the heir and devisee, namely, whether the acts of part performance, which rendered the contract binding, and in fact transferred the equitable ownership, took place before or after the making of the will—upon the result of which inquiry would depend whether the property passed by the devise or not; for, if the acts of part performance were posterior, of course the interest acquired by the contract, not having belonged to the testator when he made his will, could not pass thereby. In this point of view it is conceived that the issue directed by Sir *T. Plumer*, M. R., in the case of *Burkett* v. *Randall*, 3 Mer. 466, "whether the testator was, at the time of his death, beneficially entitled to the premises in question," would have been more correct, so far as the devisee's interest was concerned, if the inquiry had related to the period of the making of the will instead of the death of the testator.

As to devises of after-acquired copyholds.

Copyholds, equally with freeholds, are subject to the rule which restricts the operation of a devise to lands of which the testator is seised when he makes his will. *Harris* v. *Cutler*, cit. 1 Durn. & East, 438, n.; *Spring* v. *Biles*, Id. 435, n. A devise, therefore, of copyholds, however comprehensive in its terms, will not pass an after-acquired copyhold estate, except so far as its operation may happen to be enlarged by a subsequent surrender to the use of the will, which would have the effect of extending a general devise of copyholds to lands intermediately acquired. *Heylyn* v. *Heylyn*, Cowp. 130; *Attorney-General* v. *Vigor*, 8 Ves. 288. And it has been decided that a surrender to such uses as the testator "*shall*" by will appoint, applies to a will antecedently executed, it being considered that the surrenderor refers to that will which shall be

in existence at his death. *Spring* v. *Biles*, 1 D. & E. 435, n.; overruling *Warde* v. *Warde*, Amb. 299, which is *contra*. Questions of this kind are less likely to arise now that the statute of 55 Geo. 3, c. 192, stated *ante*, Vol. 3, p. 533, has rendered surrenders to the use of the will unnecessary to the validity of devises of copyholds, unless where required for some independent purpose, as the severance of a joint tenancy, the barring of an entail, or (as the doctrine under discussion allows us to add,) the extension of a devise of copyholds to intermediately acquired lands; which last purpose, however, might in general be more conveniently effected by a re-execution of the will.

After-acquired copyholds pass as part of a manor.

And here it may be observed, that as every copyhold is parcel of the manor to which it belongs, a devise of the manor will pass such copyholds, though acquired by the lord after the making of his will. *Doe* d. *Hale* v. *Hogg*, 6 Durn. & East, 708. Upon a principle somewhat analogous, it is clear that if a person having a remainder or reversion in fee, expectant on an estate for life, devises that remainder or reversion, and then by any means acquires, and by such acquisition extinguishes, the estate for life, the devise will carry the estate thus acquired, the merger of which will merely have had the effect of accelerating the ulterior estate.

Devise of the equitable interest in copyholds.

A person who has acquired an equitable interest in a copyhold estate by a contract for purchase, may of course devise that interest in the same manner as in the instance of freeholds; *Davie* v. *Beversham*, 3 Ch. Rep. 4; and it is wholly immaterial in any case, whether the contract was entered into by the testator in person, or by his authorized agent. *Greenhill* v. *Greenhill*, Pre. Ch. 320; *Earl of Bath* v. *Harvey*, Finch, 201.

Equitable interest under covenants to invest money in the purchase of real estate.

An equitable interest in real estate may be acquired not only under a covenant for the purchase of particular lands, but under a covenant to invest money in the purchase of lands (without particularising any), to be settled to uses. In such a case, any person who is to take a devisable estate under the limitations of the purchased lands, may devise the benefit of such covenant, and if he makes an express gift thereof, or devises generally all his lands, tenements, and hereditaments, or his real estate (which has been held to be sufficient), and a purchase is afterwards made pursuant to the covenant, the estate so acquired will be bound in equity by the devise. *Lingen* v. *Souray*, Pre. Ch. 400; S. C. 1 P. W. 172; *Guidot* v. *Guidot*, 3 Atk. 254; *Rashleigh* v. *Masters*, 3 B. C. C. 99; *Hickman* v. *Bacon*, 4 Id. 333; *Green* v. *Stephens*, 12 Ves. 419; S. C. 17 Ves. 64.

Devise by devisee or surrenderee of copyholds before admittance, void.

It is clear that a devisee or surrenderee of copyholds before admittance cannot devise. *Wainwright* v. *Elwell*, 1 Madd. 627.

The same rule was formerly considered to apply to an heir whose situation, though certainly distinguishable in many important respects from that of a mere devisee, has been strangely confounded with it. It was supposed, however, that the case of *Smith* v. *Triggs*, 1 Stra. 487, had es-

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tablished the invalidity of a devise by an unadmitted heir; but that case, rightly understood, seems not to have warranted any such proposition; nevertheless, several judges had recently adverted to the case as an authority on this point. (See Sir *T. Plumer's* judgment in *Wainwright* v. *Elwell*, 1 Madd. 632, and Sir *L. Shadwell's* judgment in *King* v. *Turner*, 2 Sim. 548). But the impression which this repeated recognition could not fail to produce in favour of the doctrine, must now yield to a recent decision, which precludes all doubt as to the power of an unadmitted heir to devise copyholds. The case referred to is *Right* d. *Taylor* v. *Banks*, 3 Barn. & Adolph. 664, the facts of which were as follow: On the 13th of February, 1781, John Taylor was admitted to the copyholds in question, which he afterwards surrendered to the use of his will, and then by his will devised part to his son Samuel (who was his heir-at-law) in fee, and part to his daughter Mary, in fee; Mary Taylor, on the death of the testator, entered, but was never admitted; she died, leaving her brother Samuel her heir-at-law; Samuel Taylor, who, as heir-at-law of his father and sister, was entitled to the whole, (for the devise to him by the former did not break the descent, (*vide post*)) entered, but was never admitted. By his will he devised the copyholds in question, the validity of which devise was the point at issue. The Court held that the devise was good, relying much on the doctrine in Coke's Copyholder, section 41, that the heir is tenant immediately after the death of his ancestor, and may, before admittance, surrender into the hands of the lord. And also *Brown's* case, 4 Rep. 22 b; *Brown* v. *Dyer*, 11 Mod. 73; *Morse* v. *Faulkener*, 1 Anst. 13; *Doe* v. *Tofield*, 11 East, 251; *Wilson* v. *Weddell*, Yelv. 145; which severally support the same doctrine, and were considered by Lord *Tenterden* and the rest of the Court to outweigh the recent *dicta* to the contrary, which were all founded on a mistaken view of the case of *Smith* v. *Triggs*.

Devise by an unadmitted heir held to be good.

Bequests of chattel interests in lands.

Bequests of chattel interests in hereditaments are governed by principles wholly different from those which have been just observed upon. They do not, like freehold interests, pass directly to the legatee as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, subject to the obligation of giving effect to any bequest in the will, specific or residuary, comprising the property in question: and the inquiry whether the testator was, at the time of making the will, possessed of a term of years, which he has bequeathed, would be no less unnecessary for the purpose of establishing the disposing power of the testator over the property, than the inquiry whether he was possessed of a horse or other personal chattel, which by his will he has professed to give. See *Wind* v. *Jekyl*, 2 P. W. 575; see also *James* v. *Dean*, 11 Ves. 388.

Freeholds *pur autre vie.*

A freehold *pur autre vie*, unlike all other estates, may be rendered

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transmissible either to real or personal representatives, according to the quality impressed upon it by the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law; for it now seems to be admitted that the devolution of the estate is governed by the words of limitation contained in the last conveyance, without regard to the terms of its original creation. Estates *pur autre vie* are devisable by the express terms of the statute of frauds, 29 Car. 2, c. 3, s. 12, stated *ante*, Vol. 1, p. 589; the statute of the 32 Hen. 8, (*ante*, p. 2), being confined, according to the prevalent and probably the better opinion, to estates of inheritance. *Anonymous*, Cart. 211. Though the statute of frauds required three witnesses for the devise of an estate *pur autre vie*, yet it has been long settled, that where the property is limited otherwise than to the heirs of the owner, it is distributable as part of his personal estate, whether he died testate or intestate. *Ripley* v. *Waterworth*, 7 Ves. 425.

Devise by *quasi* tenant in tail of estates *pur autre vie.*

A question, and perhaps the only one, which is open to controversy, in regard to the devising power over estates of this description is, whether, where they are limited to the tenant *pur autre vie, and the heirs of his body*, they can be devised without some act on his part to bar the entail. It is admitted on all hands that an alienation by deed is an effectual bar; but the doubt is, whether the estate is devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory, the opinion to which Lord *Kenyon* inclined in *Doe* v. *Luxton*, 6 Durn. & East, 293, in favour of the devise, being in direct opposition to that of Lord *Redesdale* in the case of *Campbell* v. *Sandys*, 1 Sch. & Lef. 294; and the decision of Lord *Manners*, in the case of *Dillon* v. *Dillon*, 2 Ball & Beatty, 77, who held, that a *quasi* tenant in tail of an estate *pur autre vie* could not by devise exclude the title of the remainder-man. In a former publication, (1 Pow. Dev. 41), the Editor treated the point as settled by the latter class of authorities, and such was evidently the impression of Sir *T. Plumer*, in the case of *Blake* v. *Luxton*, Coop. 185; but, many gentlemen, to whose opinions deference is due, think that these cases do not so preponderate as to preclude the fair discussion of the subject. Upon principle, certainly, there seems to be some difficulty in maintaining the distinction between the effect of an alienation by deed and by will. Any demonstration of the intention of the *quasi* owner in tail, whether by one mode or the other, that the estate shall go into a new channel or course of devolution, would seem to be sufficient for the purpose. If the more recent authorities against the devising power are not acquiesced in, probably the point will ere long be again agitated; but it rarely occurs in practice, and ought invariably to be prevented from occurring, by procuring testators who wish to dispose of property of this description, first to bar the *quasi* entail and remainders by deed.

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III. TO WHOM DEVISES OR BEQUESTS MAY BE MADE.

Devises to corporations.

The enactment in the statute of wills (34 Hen. 8), which forbids the devise of lands to bodies politic and corporate, exists in force at this day; and, therefore, a devise to a corporation, whether aggregate or sole, either for its own benefit, or as trustee, is void, and the lands descend to the heir, either beneficially or charged with the trust, as the case may be. *Sonley* v. *Clockmakers' Company*, 1 B. C. C. 81. It should be observed, however, that devises to corporations are authorized by some particular acts of Parliament. For instance, the statute of 43 Eliz. c. 4, was held to render valid appointments to corporations for charitable uses; *Flood's case*, Hobart, 136; and, though devises to such uses are now prevented by the act of 9 Geo. 2, c. 36, yet, the section of the latter statute, excepting out of its operation gifts to the colleges in the two English universities, and the colleges of Eton, Winchester, and Westminster, seems to have had, so far as it goes, the same effect of conferring validity on devises to those corporations. So, the stat. 43 Geo. 3, c. 107, enables persons to devise lands to the governors of Queen Anne's Bounty; and the stat. 43 Geo. 3, c. 108, authorizes, under certain limitations, the devise of lands for the erection or repair of churches or chapels, the enlargement of churchyards or of the residence or glebe for any minister of the Church of England.

Devises to aliens.

Alienage cannot, strictly speaking, be ranked among the incapacities to take by devise, as the devised hereditaments remain in the alien till office found, when they belong to the crown. *Duplessis* v. *Attorney-General*, 1 B. P. C. Toml. ed. 415. On this principle, where lands are devised to an alien and a British subject, as joint tenants, the whole does not vest in the latter, (which would be the effect if the devise to the alien were absolutely void), but in both jointly; and, if the crown does not seize the alien's moiety, (as it might do after office found, *The King* v. *Boys*, Dy. 283 b), on the decease of the alien, leaving his co-devisee surviving, the survivorship, which is incident to every joint tenancy, takes place, subject, nevertheless, to be overreached by the crown's right of seizure, after office; which would, by relation, defeat the title of the surviving joint tenant to the alien's moiety. *Forset's case*, cit. 1 Leon. 47; 4 Leon. 82. If, however, the alien survives his co-devisee, the entirety does not devolve to him, as he is disabled from taking by operation of law, even for the benefit of the crown, since the law, by its own act, never gives an estate to one whom it does not permit to retain it. See *Collingwood* v. *Pace*, 1 Vent. 417. Where a trust in lands is created for an alien, by will or otherwise, the crown, it seems, upon office found, will be entitled to the benefit of it. See *Holland's case*, cit. 3 Ch. Rep. 35. The disabilities of alienage may be removed partly, by a grant of letters of denization from

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the crown, or wholly, by an act of Parliament investing the alien with the rights and privileges of a British subject. A denizen may hold lands which he acquires by act of the party, but not those which devolve to him by act of law. A naturalized person, of course, may hold both.

Acts of naturalization have not a retrospective operation.

But, even an act of naturalization will not render valid the antecedent conveyances of the alien. And therefore, where lands were devised to an alien in trust for sale, who, after making sales and conveyances of parts of the estate in execution of his trust, was naturalized by act of Parliament, it was held that the act did not validate the titles of the purchasers. *Fish* v. *Klein*, 2 Mer. 431. The ordinary form of the acts of naturalization is, that the alien "shall be and is hereby *from henceforth* naturalized, and shall be, to all intents and purposes, reputed and taken to be, in every condition, respect, and degree, as if he had been a natural born subject within the United Kingdom; and shall be and is hereby enabled &c. to inherit and be inheritable, and to ask, take, retain, have, keep, and enjoy all or any manors," &c. The act has not a retrospective operation, and the practice of Parliament will not permit it to be framed otherwise than in the present form. To establish derivative titles, therefore, an express act, or a grant from the crown, is requisite. See *Fish* v. *Klein*, 2 Mer. 431.

Devises and bequests to bastards.

A bastard in *esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question that now admits of discussion, in regard to gifts to such persons, is, whether they are sufficiently designated as the objects of them; (see *Gordon* v. *Gordon*, 1 Mer. 141); and this depends on rules of construction of great practical importance in the preparation of wills, and which will hereafter receive examination. Whether a gift can be made to bastards not procreated, is *vexata quæstio*. The early authorities certainly lean to the negative; the reason assigned being, that "the law does not favour such a generation, nor expect that such shall be." *Blodwell* v. *Edwards*, Cro. El. 509; Co. Lit. 3. b. But if, as some gentlemen think, the objection arises merely from the uncertainty attaching to objects of this nature, as being *filii nullius*, until reputation has assigned to them a father, that objection might be removed by a description referring to the maternal parent only, omitting any reference to the father, as, "to the future illegitimate children of Ann Wilkins." It is conceived, however, that the objection stands upon a higher principle. Every prospective provision for illegitimate children not only supposes, but indirectly holds out encouragement and sanction to incontinency, and might therefore seem to be impeachable, as having an immoral tendency; though at present no decision can be considered as actually going this length. In the case of *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422, Lord *Eldon*, in allusion to this point, said he would leave it where he found it, *without any determination*.

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Gifts to infants, *femes covertes*, lunatics, and idiots.

Infancy, coverture, insanity, and idiotcy, do not incapacitate from taking by devise or bequest, though these disabilities of course prevent the subjects of them from testifying their assent or acceptance; the want of which, however, is not allowed to produce any practical inconvenience, being presumed in the absence of evidence to the contrary, unless where such presumption would work injury to the devisee.

Another impediment to a person taking by devise arises from his dying before the testator, this being a necessary consequence of the ambulatory nature of wills, discussed in the next section. The subject of lapse, however, is so important a branch of testamentary law, that it has been made the subject of separate consideration (*a*).

FORM OF WILLS.

IV. 1. FORM OF THE INSTRUMENT.

Ambulatory nature of wills.

A will is an instrument by which a person disposes of his property after his decease; until which event it is to remain ambulatory and inoperative. The latter quality forms the distinguishing characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposer, yet this result must be produced by the express terms, and cannot flow from the nature of the instrument. Thus, if a man should by deed limit lands to himself for life, with remainder to A. in fee, the effect upon the usufructuary enjoyment would be the same as if he made an immediate devise by will to A. in fee; and yet the case fully illustrates the distinction in question: for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee; while, in the latter, he takes no interest whatever until the decease of the testator.

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The law has not required to the validity of a will that it should assume any particular form, or be expressed in testamentary language. It is only necessary that the instrument should disclose the intentions of the deceased owner respecting the posthumous destination of his property.

Instruments in the form of deeds, agreements, &c., held to be testamentary.

A letter, *West's case*, Mo. 177, pl. 314; *Manly* v. *Lakin*, 1 Haggard, 130; *Re Dunn*, Id. 488; *Henderson* v. *Farbridge*, 1 Russ. 479, a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation, in regard at least to copyholds and personal estate; for, though the principle applies equally to devises of freeholds, its actual application to them has been considerably checked by the statute of frauds, which requires an attestation by three witnesses; and these informal and irregular instruments are rarely, if ever, so attested, being in fact executed *diverso intuitu*. It may be proper to state in detail some of the leading cases of this class.

(*a*) *Vide post*, Sect. vii.

Instrument commenced as an indenture, but ending as a will.

Thus, in the case of *Hixon* or *Hickson* v. *Witham*, 1 Ch. Cas. 248, S. C. Finch, 195, where A., by indenture made between him of the one part, and B. and C. of the other part, in consideration of 5*l.*, bargained and sold to them certain lands in trust, to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the rest thereof and all his personal estate he gave and bequeathed (for the language was here changed to the first person) in favour of certain persons. A. made B. and C. executors *of his will;* and signed, sealed, published, and declared the instrument as his will in the presence of several witnesses. The Court declared this to be a good will.

Instrument intitled "Articles of Agreement."

So, in the case of *Green* v. *Proude*, 3 Keb. 310, S. C. 1 Mod. 117, where, by an instrument, intitled 'Articles of Agreement', made between A. of the one part, and B. of the other part, it was agreed between them that A., being sick in body, gives, &c.; in consideration whereof, B. promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i. e.* in witness whereof the parties have hereunto interchangeably set their hands and seals. This instrument was delivered as a deed; but it was held to be testamentary, and as such revocable; and the Court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will.

Contemporaneous deed and will held to be testamentary.

Again, in the case of *Peacock* v. *Monk*, 1 Ves. sen. 127, where A., being about to settle his affairs, upon the same day made two instruments; one he called a deed, by way of agreement between him and B., and the other he called his will. By the deed, he put 4000*l.* into the hands of B., to pay to A. himself an annuity for life of 160*l.*, and afterwards to pay 1000*l.* a-piece to C. and D. if they survived him, and an annuity of 100*l.* to E. for life if she survived him, the residue to B. There was a proviso, that if the 160*l.* annuity was in arrear, B. should repay the 4000*l.* to A., to be placed out in the joint names of A. and B. (*a*). By the will, B. was appointed executor and made residuary legatee. Lord *Hardwicke* said, "B. being both executor in the will and contractor in the deed, and both instruments being executed at the same instant (as it must be taken, being on the same day), it speaks the whole to be a testamentary act. In several cases, the nearness of one act to another makes the Court take them as one; so that it is a testamentary act, though

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(*a*) This clause shewed that the instrument was designed to operate in the donor's lifetime. In a much earlier case (*Audley's case*, 4 Leon. 166), it appears to have been considered as conclusive against the construing an instrument as a will, that by it an estate was to be taken by the maker "who could not take by his own will."

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not strictly so, because not revocable" (*a*). The case of *Tomkyns* v. *Ladbroke*, 2 Ves. sen. 591, before the same Judge, was very similar in its circumstances. A., a freeman of London, two days before his death, executed a will and a deed, by the last of which he assigned 5000*l.*, part of his personal estate, to trustees, to the separate use of his daughter. Lord *Hardwicke* held that this was a testamentary act, and, as such, a fraud on the custom which allows a freeman to give away his personal estate by act *in extremis*, provided he divests himself of all property in it; but not if he reserved to himself a power over it. The case of *Hog* v. *Lashley*, decided by the House of Lords, 7th May, 1792; and stated 3 Hagg. 415, n., is confirmatory of the same principle; as an instrument, executed in the form of a Scotch settlement (for lands in Scotland are not disposable by will), but containing dispositions intended for the most part to take effect after the decease of the maker, was adjudged to be testamentary.

Instrument in the form of a deed poll held to be testamentary.

Again, in the case of *Habergham* v. *Vincent*, 2 Ves. jun. 204, S. C. 4 B. C. C. 353, where A., by his will, duly executed and attested, devised his freehold and copyhold estates to certain uses, with remainder to such persons and for such estates as he by any deed or instrument in writing, to be executed by him and attested by two witnesses, should appoint. By an instrument executed on the following day, under the hand and seal of the testator, stamped and concluded like a deed, the testator recited this power in his will, and then proceeded thus—"Now know ye, that, by this my deed poll, I do direct and appoint, that my trustees (naming them) shall, immediately after &c., convey to certain uses, &c." It was held, by Lord *Loughborough*, assisted by Mr. Justice *Wilson* and Mr. Justice *Buller*, that the second instrument was testamentary. Mr. Justice *Buller* said, that the cases had established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases, there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after his death, it was considered as a will.

Remark upon *Habergham* v. *Vincent*.

The consequence of holding the instrument in question to be a codicil, in this instance, was, that it operated upon the copyholds, but not upon the freeholds, not being attested by three witnesses; and the Court decided that it was not competent to a testator to reserve to himself, by his will, a power to dispose of freehold estates by an unattested codicil.

(*a*) By this observation it should seem, that his Lordship thought that the instrument might be testamentary for some purposes, but not for others: a doctrine in which there seems insuperable difficulty.

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Property professedly settled by deed, held to be liable to the legacy duty.

Another case in which a question of this kind was discussed is, *Attorney-General* v. *Jones*, 3 Price, 460; where A., by indenture dated 25th March, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C. and D.; also certain stock in the funds, with the dividends which should be due thereon at his decease, the arrears of any pension that might be due to him at his death, and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life, and after his decease, for a daughter. The instrument reserved to A. a power of revocation by deed or will. By will, dated 16th April, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A. did not transfer the stock, or part with the possession of the asssigned property, or even communicate to the trustees the existence of the deed. The question was, whether the property assigned by it was liable to the legacy duty; and the Court of Exchequer (*Wood*, B., *diss.*) decided in the affirmative, adverting to the circumstance that the consideration was nominal; the trust for the grantor not to receive the dividends merely, but implying a power in him to dispose of the property as he should think proper (*a*); that he kept the deed in his own possession, never transferred the stock to the trustees, nor invested them with the control of the property, or even informed them of it; that, *though the legal estate was in the trustees*, the actual ownership remained with the grantor; that the deed professed to grant the property of which the maker should be possessed at the time of his decease, which, otherwise than as a will, it could not do; it contained a power of revocation by the most informal instruments; and, lastly, (on which great stress was laid), that the will, by referring to, and confirming the deed, "threw a testamentary character over the whole." *Wood*, B., in support of his contrary opinion, relied not only on the form of the instrument, which was perfect as a deed, but on its effect; which, he said, was to vest the legal estate in the leasehold property in the trustees *instanter*. *And was there*, he asked, *a case where the estate passed by a will in the lifetime of the testator?* He argued, that the confirmation of it in the subsequent will made no difference. "Suppose," said the learned Judge, "there had been no power of revocation, would it not have been valid as a deed?—and suppose, in that case, the party had made a will, disposing of the property differently, that will would not avail against a deed; but the deed, notwithstanding the alteration of the will, if he had not reserved the power, would prevail against the will. That shews it is a deed. If,

(*a*) It was merely for the use and benefit of A. for life.

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on the other hand, he had made a will, and then another, the second would have been a revocation of the first."

Remark upon *Attorney-General* v. *Jones*.

This case has not been approved of by the profession, and the reasoning of the Court is far from being satisfactory. The argument founded on the power of revocation is singular, because such a power was not required if the instrument was testamentary, and could only operate in case the instrument, taking effect as a deed, was not revocable in its nature; and yet this argument so powerfully influenced Mr. Baron *Graham*, that he admitted, that if the instrument had not contained a power of revocation, he should have come to a different conclusion. But the observations on the case of *Attorney-General* v. *Jones*, and the important practical considerations it suggests, more properly find a place in the title "Settlements," in the framing of which it ought to be kept in view.

Rule in ecclesiastical Courts as to instruments testamentary in substance but not in form.

The ecclesiastical Courts (before which, of course, questions of this kind are most frequently agitated) act fully up to the principle of regarding an instrument as testamentary which is intended not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos;* and more especially if it be incapable of operation in the intended form; and, accordingly, in repeated instances, the Prerogative Court has granted probate of the assignment of a bond by indorsement, *Musgrave* v. *Down*, T. T. 1784; receipts for stock and bills indorsed, *Sabine* v. *Goate & Church*, 1782; a letter, *Drybutter* v. *Hodges*, E. T. 1793; marriage articles, *Marnell* v. *Walton*, T. T. 1796; and promissory notes, and notes payable by executors, in order to avoid the legacy duty, *Maxee* v. *Shute*, H.T. 1799; severally cit. 2 Hagg. 247. And on the authority of these cases, it was lately decided by Sir *J. Nicholl*, that the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him to the trustees of the marriage settlements of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death, were to be received as testamentary. *Masterman* v. *Maberley*, 2 Hagg. 235.

Instrument professing to be a deed of settlement held to be testamentary.

In a subsequent case, the facts shortly were, that, in 1819, A., and B. his wife, executed a deed, conveying property to trustees for the use of A. and B.; and upon the death of the survivor, to pay over the property to different persons. A. survived his wife, and died without having exercised a power reserved to him of revoking the trusts. Probate to the trustees was prayed, on the ground that the deed was, in its whole purport and effect, testamentary, not being to operate until after the death of A., and the Court decreed accordingly. *In re Knight*, 2 Hagg. 554.

Paper containing words of present gift held to be not testamentary.

But it should seem, that if the instrument is not testamentary, either in form or in substance, none of the gifts in it being expressed in testamentary language, or in terms postponed to the death of the maker, and no collateral evidence is adduced to shew that it was intended as a will,

probate will not be granted of it as such. Thus, where a minor (aged nineteen) wrote a paper in these words:—"I, A. B., of &c., in the presence of the two under-mentioned witnesses, C. D., of &c., and E. F. of &c., do give all my goods and chattels to M. D., of ——, spinster." This paper was dated and witnessed by the two persons referred to in the body of it. The Court was of opinion, that, as the paper bore upon the face of it no evidence of its being intended to be testamentary; but it rather appeared, both from its contents, and the evidence *dehors* (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted. *King's Proctor* v. *Daines*, 3 Hagg. 218.

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And in another instance probate was refused of a letter by the deceased to a friend, directing the sale of stock, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale. *Glynn* v. *Oglander*, 2 Hagg. 428.

BY WHAT LOCAL LAW REGULATED.

IV.—2. BY WHAT LOCAL LAW WILLS ARE REGULATED.

Local law governing wills.

As the form of testamentary dispositions varies in different countries, the present seems to be the proper place for shewing by what local law wills are regulated.

Realty ruled by *lex rei sitæ*; personalty, by *lex domicilii*.

A will of lands is generally governed by the *lex loci rei sitæ*. In short, the place where, and the language in which such a will is written, are wholly unimportant as affecting both its construction and the formalities of its execution. The locality of the lands alone is to be considered. Thus, a will made in Holland, and written in Dutch, must, in order to operate on lands in England, contain expressions, which, being translated into our language, would comprise and destinate the lands in question, and must be executed and attested in the same manner as if the will were made in England. *Bovey* v. *Smith*, 1 Vern. 85; see also *Bowaman* v. *Reece*, Pre. Ch. 577; *Drummond* v. *Drummond*, 3 B. P. C. Toml. ed. 601; see *Brodie* v. *Barry*, 2 Ves. & Bea. 131. And of course lands in England, belonging to a British subject domiciled abroad dying intestate, will descend according to the English law. See *Doe* d. *Birtwhistle* v. *Vardill*, 5 Barn. & Cress. 438.

In regard to personalty, however, whether in the case of testacy or intestacy, the *lex domicilii* prevails (*a*). If a foreigner, therefore, is domiciled in England, his personal property, in case he died intestate, will be distributed according to the English law of succession, and any will he may have left, though made in his native country, must be construed according to the law of England. *Anstruther* v. *Chalmer*, 2 Sim. 1. And it is

(*a*) This position respects only the devolution of the property, and not the Court of administration, which, by our law, is regulated by the *lex loci rei sitæ*.

BY WHAT LOCAL LAW REGULATED.

scarcely necessary to observe, that stock in the public funds, British or foreign, is undistinguishable in this respect from other personal property. See *In re Ewin*, 1 Cromp. & Jerv. 151 (*a*). And so, it is conceived, are even terms for years, as the distinction which prevailed in the civil law between moveable and immoveable property has given place in our law to the distinction between real and personal estate.

On the other hand, if a British subject becomes domiciled abroad, the law of the place which at his death constituted his domicile, will govern the distribution of his personal property in England, in case of intestacy; *Balfour* v. *Scott*, 6 B. P. C. Toml. ed. 550; *Bruce* v. *Bruce*, Id. 566; S. C. 2 Bos. & Pull. 299, n.; *Hog* v. *Lashley*, 6 B. P. C. Toml. ed. 577; *Bempde* v. *Johnson*, 3 Ves. 198 (*b*); *Somerville* v. *Lord*

Legacy duty as affecting the property of persons dying domiciled in India, and of foreigners.

(*a*) In this case the question was, as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicile, alienage, &c. Two important points in relation to this subject have lately been decided, namely, 1*st*, that the property of a deceased Englishman domiciled in India, is not rendered liable to the English legacy duty by the circumstances of its being remitted to bankers in England, and of a suit respecting the distribution of the property being instituted in the Court of Chancery here, in whose jurisdiction the executors happen to be. *Jackson* v. *Forbes*, 2 Cromp. & Jerv. 382. And 2*ndly*, that the property of a foreigner residing abroad, though situate in England, and bequeathed to British legatees, is not liable to the legacy duty, being a tax, affecting the property of British subjects only. *In re Bruce*, 2 Cromp. & Jerv. 436. See further as to legacy duty, *ante*, Vol. 8, p. 390.

What constitutes domicile

(*b*) In this case, Lord *Loughborough* said: "The question of domicile *primâ facie*, is much more a question of fact than of law. The actual place where a person is, is *primâ facie*, to a great many purposes, his domicile. You encounter that, if you shew it is either constrained, or from the necessity of his affairs, or transitory, that he is a sojourner, and you take from it all character of permanency. If, on the contrary, you shew that the place of his residence is the seat of his fortune, of the place of his birth, upon which I lay the least stress; but, if the place of his education, where he acquired all his early habits, friends, and connections, and all the links that attach him to society are found there, if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question."

Some points as to domicile.

Domicile is not lost by mere abandonment, it is not to be defeated *animo* only, but *animo et facto*, and necessarily remains until a subsequent domicile be acquired, unless the party die *in itinere* toward an intended domicile. *Per* Sir *J. Leach*, V. C., in *Munroe* v. *Douglas*, 5 Madd. 379.

It has been decided that a person does not change his domicile by

Somerville, 5 Ves. 750: and will, if he left a will, determine the validity and regulate the construction of such will; of which, therefore, an English Court will not grant probate unless it be an effectual testamentary instrument, according to the law of the domicile. *Stanley* v. *Bernes*, 3 Haggard, 375. And, by parity of reasoning, the Court will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though clearly invalid as an English will, as was lately done by the Prerogative Court, in the instance of the will of a married lady domiciled in Spain (*a*), on its being shewn that by the Spanish law a *feme covert* may, under certain limitations, dispose of her property by will as a *feme sole*. *Re De Vera Maraver*, 1 Hagg. 498.

BY WHAT LOCAL LAW REGULATED.

Principle adopted by the Court in granting probate.

And it is the constant practice of the Court to grant probate of a will previously proved in India, without inquiring into the grounds of the Indian proceeding, though the bulk of the property of the deceased testator (whose domicile was in India) happens to be in England. *Re Read*, 1 Hagg. 474.

The necessity of conforming in the testamentary act to the law of the domicile is a most important doctrine to the numerous British residents in foreign countries; and it appears from the case of *Stanley* v. *Bernes* that the circumstance of the will being English in language and form, and of its shewing that the testator contemplated returning to England (*b*), (but which intention he never executed), are insufficient to exclude the *lex domicilii*. If an Englishman, domiciled abroad, has real property in England, he ought to make two wills, one devising such property duly executed and attested according to the English law, and the other be-

Remarks upon wills of Englishmen domiciled abroad.

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going to India in the king's service; *secùs*, if he enters into the service of the East India Company. *Bruce* v. *Bruce*, 2 Bos. & Pull. 229.

It has been made a question, whether, after the death of the father, children remaining under the care of the mother follow the domicile which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is in favour of the former; and, therefore, where an Englishman domiciled in Guernsey, died there, and the widow came to and took up her residence in England, bringing her children with her; it was held that the succession to the personal property of two of her children, who afterwards died at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention. *Potinger* v. *Wightman*, 3 Mer. 67.

(*a*) The testatrix was a native of Spain; but this, it is conceived, was immaterial.

(*b*) As to the *animus revertendi* see also *Bruce* v. *Bruce*, 2 Bos. & Pull. 299, n.

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queathing, if permitted, the personalty conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to exclude some perplexing questions involving the application to an uncertain extent of the conflicting principles respectively governing real and personal property. See *Brodie* v. *Barry*, 2 Ves. & Bea. 130.

As to Scotland.

Similar questions may arise, and similar doctrines would apply in regard to the property of Englishmen domiciled in Scotland, and of Scotchmen domiciled in England, the law of succession and testamentary disposition being, in some respects, dissimilar in these two parts of the United Kingdom. Where an Englishman or Scotchman divides his time equally between the two countries, the actual domicile is difficult to be ascertained, from the absence of preponderating evidence in favour of either. Such was the case of Lord *Somervil'e*, (5 Ves. 750), a Scotchman by birth and extraction, originally domiciled in Scotland, who took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment;—he died at his house in London. Sir *R. P. Arden*, after an elaborate argument, held, that the original domicile remained unchanged, and consequently the succession to the property of the deceased nobleman (who died intestate) was to be governed by the law of Scotland. The argument in favour of the English domicile was raised by the relations of the half blood, whom the law of Scotland excludes. Some increase of difficulty would occur in applying the principle where the deceased had no original domicile in either of the two countries, which, in his latter years, he alternately made his home. Such a case, however, is not likely to occur.

V. RESTRAINTS ON THE TESTAMENTARY POWER.

GIFTS TO CHARITABLE USES.

1. *Gifts to Charitable Uses* (*a*).

What are charitable uses.

Lord *Hardwicke* has defined charity to be a general public use. Amb. 651. In order to ascertain what are charitable purposes, recourse is usually had to the statute of 43 El. c. 4, which enumerates various kinds of charity; viz. the relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars of universities; repair of bridges, ports, havens, causeways, churches, sea banks, and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners

(*a*) As to superstitious uses, *vide* stat. 16 Richard 2, c. 5; 23 Hen. 8, c. 10; 37 Id. c. 4; 1 Edw. 6, c. 14; 1 Geo. 1, c. 55; and *King* v. *Portington*, 1 Salk. 162.

GIFTS TO CHARITABLE USES.

or captives; and aid or ease of any poor inhabitants, concerning payment of fifteens; setting out of soldiers, and other taxes. Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. Thus, gifts for the erection of water-works for the use of the inhabitants of a town or city, *Jones* v. *Williams*, Amb. 651; for the general improvement of a town or city, *Howse* v. *Chapman*, 4 Ves. 542; for the establishment of a life-boat, *Johnson* v. *Swan*, 3 Madd. 457; or of a botanical garden, *Townley* v. *Bedwell*, 6 Ves. 194; to the trustees and for the benefit of the British Museum, *Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 595; to the poor inhabitants of a parish, *Attorney-General* v. *Clarke*, Amb. 422, (which is held to apply to those not receiving parochial relief, *Bishop of Hereford* v. *Adams*, 7 Ves. 324); to the widows and children of seamen belonging to a port, *Powell* v. *Attorney-General*, 3 Mer. 48; and to the widows and orphans of the parish of A., *Attorney-General* v. *Comber*, 2 Sim. & Stu. 93—have been respectively adjudged to be charitable. But the erection of a monument, to perpetuate the memory of the donor, is not a charitable purpose, *Mellick* v. *President of The Asylum*, 1 Jac. 180; nor is the repair of a vault and tomb containing his remains; *contrà*, it seems, if the vault is to be used for the interment of the donor's family. See *Doe* d. *Thompson* v. *Pitcher* (*a*), 3 Mau. & Selw. 407; S. C. 6 Taunt. 359.

Gifts held to be not charitable.

A gift will not be deemed to be charitable merely from the professional character of the devisee, accompanied only by an expression of the testator's expectation that he will discharge the duties incidental to such character. Thus, where the devise was to the Rev. A. A., a dissenting minister, for life, upon condition that he did and should, immediately after the testator's decease, settle and convey the same to trustees, to take place at his (A. A.'s) decease, for the support of the preaching of the Word of God at the meeting-house at L.; and the testator expressed his expectation that the devisee would, after his (testator's) decease, without delay, settle and forward every thing in his power to promote and carry on the Word of God at L., both in his lifetime and after his decease. No attempt was made to support the devise of the remainder after the decease of A. A., (which was clearly void under the enactment presently discussed); but it was contended, that the devise to A. A. for life was void, as charitable, being not in his individual capacity, but in the character of preacher, and in confidence that he would

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(*a*) In this case the statute had been complied with, and therefore the point did not arise. Perhaps, the latter branch of Lord *Ellenborough's* doctrine is open to exception. A distinction seems to run through the cases between gifts for the benefit of the family of the donor and of strangers. The former are not in general considered to be charitable.

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discharge the duties of that station. But the Court held, that it was not charitable, and thought the point too clear for discussion. *Doe* d. *Phillips* v. *Aldridge*, 4 D. & E. 264. In this case, the devisee was adjudged to be entitled beneficially, and herein it differs from those next stated, in which the gift was held to create a trust, though too indefinite to be executed.

Trusts too indefinite to be pronounced charitable.

Thus, it has been decided that a bequest to the Bishop of D., to dispose of *to such objects of benevolence and liberality* as he should approve, is not charitable, and that the bishop was a trustee for the next of kin. *Morice* v. *Bishop of Durham*, 9 Ves. 408, S. C. 10 Ves. 532.

A similar decision was made, where the gift was to A. and B., and to their executors or administrators, in trust, to be by them applied and disposed of *for and to such benevolent purposes* as they, in their integrity and discretion, might unanimously agree on; the doctrine advanced by the Court being, that if the property might, consistently with the will, be applied to other than directly charitable purposes, the trust was too indefinite for the Court to execute. *James* v. *Allen*, 3 Mer. 17.

So, where an estate was devised to trustees, to be applied by them, and the officiating minister of the congregation or assembly of the people called Methodists, assembling at L., and as they should from time to time think fit to apply the same; Lord *Ellenborough* and the Court of King's Bench held, that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in the last case but one. *Doe* d. *Toone* v. *Copestake*, 6 East, 328.

Again, where a testator gave the residue of his estate to his executors, upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and in default, upon trust to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir *J. Leach*, V. C., observed, that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit. The purposes of the trust being so general and undefined, they must fail altogether, and the next of kin become entitled. *Vezey* v. *Jamson*, 1 Sim. & Stu. 69.

So, where a testatrix declared, as to certain money, that she wished "it to be given to private charity," Sir *T. Plumer*, M. R., held that the words did not create a trust which could be carried into effect. The

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charities recognised by the Court were public in their nature, and such as the Court could see to the execution of; but here, the disposition was confined to private charity. Assisting individuals in distress was private charity; but such a purpose could not be executed by the Court or by the crown. *Ommaney* v. *Butcher*, Turn. & Russ. 260.

Policy of early times towards dispositions for charity.

The policy of early times strongly favoured gifts, even of land, to charitable purposes. Thus, not only was no restraint imposed on such dispositions by the statutes of wills (*vide ante*, p. 2), but the act of 43 Eliz. c.4, as that act was construed by the Courts, tended greatly to facilitate gifts of this nature, the statute having been held to authorize testamentary appointments to corporations for charitable uses, *Flood's case*, Hob. 136, and even to enlarge the devising capacity of testators, by rendering valid devises by a tenant in tail; *Attorney-General* v. *Rye*, 2 Vern. 453; *Attorney-General* v. *Burdett*, Id. 755; see also 3 Ch. Rep. 154; and also by a copyholder, without a previous surrender to the use of the will; *Rivett's case*, Moor, 890, pl. 1253, 3 Ch. Rep. 220—as appointments to charitable uses; though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like. See *Collison's case*, Hob. 136.

To the same policy we may ascribe those rules of construction which obtained a reception, and have retained their hold even until now in the Courts; by the effect of which, property once devoted to charity was never allowed to be diverted into any other channel by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the current of public opinion appears to have set in an opposite direction, and the Legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which, it may be presumed that the practice of devising lands to such purposes had antecedently prevailed to an extent which threatened public inconvenience. It appears to have been considered that this tendency would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime, the supposition evidently being, that men were in little danger of being injuriously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death. Accordingly, the stat. of 9 Geo. 2, c. 36, (usually, but rather inaccurately, called the statute of mortmain (*a*)), enacts, That no hereditaments, or personal estate to be laid out in the purchase of hereditaments, shall be conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever or any ways charged or incumber-

Statute 9 Geo. 2, c. 36.

No hereditaments or personal estate to

(*a*) The inaccuracy of this expression has been often remarked. It is convenient, however, because it distinguishes the statute from 43 Eliz. c. 4.

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be laid out in the purchase of hereditaments, or charged for the benefit of any charitable use,

other than by indenture enrolled in Chancery, &c.

ed, in trust or for the benefit of any charitable uses whatsoever, unless such settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months before the death of the donor, and be enrolled in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death of the donor, and unless the same be made to take effect in possession for the charitable use intended, and be without any power of revocation, reservation, trust, &c., for the benefit of the donor, or of any persons claiming under him.

Exception of purchases, gifts to certain colleges, and property in Scotland.

By the 2nd, 3rd, 4th, and 5th sections, the act is declared not to extend to purchases for a valuable consideration (*a*), or to dispositions in trust for the two English universities, or any of the colleges within them, or the colleges of Eton, Winchester, or Westminster, for the maintenance of the scholars upon the foundations, or to the disposition of any estate real or personal, lying or being in Scotland.

What species of property held to be within the statute.

The statute, it is clear, extends to property of every description which savours of the realty—as, a grant from the crown of the right to lay chains in the river Thames, for mooring ships, *Negus* v. *Coulter*, Amb. 367; canal shares, *Howse* v. *Chapman*, 4 Ves. 542; money secured on turnpike tolls, *Knapp* v. *Williams*, 4 Ves. 430, n.; or by an assignment of the poor's rates and county rates, *Finch* v. *Squire*, 10 Ves. 41; leaseholds and mortgages, whether in fee or for years, *Attorney-General* v. *Graves*, Amb. 155; *Attorney-General* v. *Caldwell*, Id. 635; *Attorney-General* v. *Meyrick*, 2 Ves. sen. 44; *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *White* v. *Evans*, 4 Ves. 21; *Currie* v. *Pye*, 17 Ves. 462. And, where a testator had bequeathed his personal estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held, that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute, and accordingly could not pass with the rest of his personal estate. *Harrison* v. *Harrison*, 1 Russ. & Mylne, 71. Again, where A., being entitled to certain sums of money which were to be raised by the execution of a trust for sale of real estate, bequeathed all his personal estate to B.; B. bequeathed the residue of her personal estate to charity. It was contended, that, as the period for raising the sums in question had arrived in the lifetime of B., (though they were not actually raised until after her decease), it was a breach of duty in the trustees not to raise them, and this neglect ought not to invalidate the gift, especially as the charities had no right to elect to take it as land; but Sir *J. Leach*, V. C., held, that these sums, constituting an interest in land at the testator's death, could not be legally given to the charities. *Attorney-General* v. *Harley*, 5 Madd. 321.

Legacy partly

If the pecuniary gift is partly charged upon land and partly personal,

(*a*) Vide stat. 9 Geo. 4, c. 85.

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it will be void *pro tanto*. And therefore, where a testator devised a freehold estate to be sold, and the produce applied, together with so much of the personal estate as should be necessary, to secure an annuity of 30*l*. for the life of A., and, after his death, the principal to go to a charity; the freehold estate not being sufficient to raise the money, it was held that the bequest was good as to the residue, which was to be raised out of the personal estate. *Waite* v. *Webb*, 6 Madd. 71.

real and partly personal, void *pro tanto*.

Where lands are devised in trust for a charity, the trust is not only itself void, but it infects the legal estate on which it is ingrafted. *Adlington* v. *Cann*, 3 Atk. 155; *Doe* d. *Burdett* v. *Wrighte*, 2 Barn. & Ald. 710; see also *Carrick* v. *Errington*, 2 P. W. 361; and therefore, the heir may recover at law, except where there are other trusts not charitable, which of course would entitle the trustees to retain the estate, independently of the vacated trusts, and oblige the heir to prosecute his claim in equity. *Willet* v. *Sandford*, 1 Ves. sen. 186; see also *Doe* v. *Copestake*, 6 East, 328; *Doe* v. *Pitcher*, 6 Taunt. 359.

Charitable trust vitiates the legal estate.

Where the conveying of land to a charity is injoined as a condition subsequent, as where the devise is to A. on condition that he shall assign Whiteacre (part of the devised estate) to a charity, the condition alone is void, and the devise is absolute. *Poor* v. *Miall*, 6 Madd. 32.

Though the statute contains no express words prohibiting a bequest of money to be produced by the sale of land, yet it is settled, by construction, that such a bequest is within the spirit and meaning of the enactment. *Curtis* v. *Hutton*, 14 Ves. 537; *Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 595. The statute, however, expressly extends to the converse case of money being directed to be laid out in land. *Attorney-General* v. *Heartwell*, 2 Eden, 234, and applies not only where the trust expressly directs the investment in land, but where such an application of it is consequential on the nature and purposes of the charity. *Widmore* v. *Woodroffe*, Amb. 636; *Middleton* v. *Clitherow*, 3 Ves. 734.

Bequest of the proceeds of real estate within the statute.

A recommendation to trustees to purchase land is imperative on them, and consequently is no less invalidating in its effect than a trust which is expressly mandatory. *Attorney-General* v. *Davies*, 9 Ves. 546; *Kirkbank* v. *Hudson*, 7 Pri. 212. But if an option is given to the trustees to lay out the money in land, or upon government or personal security, the bequest is not affected by the statute. *Soresby* v. *Hollins*, Amb. 211; *Curtis* v. *Hutton*, 14 Ves. 537. If, however, investment in land is the ultimate destination of the money, the bequest will not be protected by the circumstance of provision being made for its suspension during an indefinite period; and, therefore, a gift of personal estate, to be laid out in the purchase of lands, has been held to be void, notwithstanding that the trustees are empowered to invest the money in the funds until an eligible purchase can be made. *Grieves* v. *Case*, 4 B. C. C. 67, S. C. Dick. 251; *English* v. *Orde*, Duke, Ch. Uses, 432; *Pritchard* v. *Arbouin*, 3

Recommendation to purchase land held to be mandatory.

Legacy good where trustees have an option to invest in land or other security.

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Russ. 458. These determinations have clearly overruled the case of *Grimmett* v. *Grimmett*, Amb. 210; and it seems somewhat difficult to reconcile with them the more recent case of *Attorney-General* v. *Goddard*, 1 Turn. & Russ. 348, where a testatrix, after bequeathing 1000*l.* Indian annuities, to trustees, for charitable purposes, added, "as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift;" Sir *T. Plumer*, M. R., hesitatingly held the bequest to be valid, though he admitted it to be doubtful whether the clause in the will did not amount to a direction to purchase land, and whether the discretion extended to any thing further than the selection of the estate.

So where the purchase of land is not essential to the trust.

It is clear, that where the charitable trust or purpose may be executed without purchasing land, the legacy is good. Thus, where the testator bequeathed 2800*l.* three per cent. reduced annuities, and directed the dividends to be applied "for and towards establishing a school," Lord *Thurlow* said, that this did not include the purchase or renting of land: the master might teach in his own house, or in the church. *Attorney-General* v. *Williams*, 4 B. C. C. 526. So, in another case, the bequest of personalty, "to be a perpetual endowment and maintenance of two schools," was considered, by *Richards*, C. B., to be so far good; though it was rendered void by the addition of a recommendation to purchase land. *Kirkbank* v. *Hudson*, 7 Price, 221. And even where the interest of the bequeathed fund was directed to be applied in providing a proper school-house, Sir *J. Leach*, V. C., considered that, as the intention might be executed by hiring a house, without the necessity of purchasing land, the bequest was valid; and that this was not varied by expressions shewing that the testator contemplated the continuance of the charity for ever. *Johnson* v. *Swan*, 3 Madd. 457.

Legacy to be applied in erecting school-house, bad.

It has been much questioned whether a bequest of money, to be applied in the erection of a school-house, or other building, for charitable purposes, is bad, as involving a trust to purchase. Lord *Hardwicke* thought that if the trustees could get a piece of ground given to them, so that land need not be purchased, the gift was good. *Vaughan* v. *Farrer*, 2 Ves. sen. 182; *Attorney-General* v. *Bowles*, Id. 547. The contrary, however, is now settled by a series of decisions. *Foy* v. *Foy*, 1 Cox, 163; *Attorney-General* v. *Nash*, 3 B. C. C. 588; *Attorney-General* v. *Whitchurch*, 3 Ves. 144; *Chapman* v. *Brown*, 6 Id. 604; *Attorney-General* v. *Parsons*, 8 Id. 186; *Attorney-General* v. *Davies*, 9 Ves. 535; *Pritchard* v. *Arbouin*, 3 Russ. 458.

Improvement of land already in mortmain allowed.

But the bequest of a sum of money, to be applied in the erection of buildings on land which is already devoted to charitable purposes, *Glubb* v. *Attorney-General*, Amb. 373; *Brodie* v. *Duke of Chandos*, 1 B. C. C. 144, n.; *Attorney-General* v. *Bishop of Oxford*, Id.; *Attorney-General* v. *Parsons*, 8 Ves. 186; *Attorney-General* v. *Munby*, 1 Mer. 327, or in the

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repair and improvement of buildings devoted to charity, *Harris* v. *Barnes*, Amb. 651; *Attorney-General* v. *Chester*, 1 Bro. C. C. 444, is unquestionably good, as by such gifts no additional land is thrown into mortmain (*a*).

Legacy to be applied in discharging an incumbrance on charity property invalid.

A legacy to be applied in the liquidation of a subsisting incumbrance on land which is already subject to charitable uses, appears to have been considered as not falling within the principle applicable to trusts for the amelioration and improvement of charity property, but as appropriating to charity a new interest in land. Thus it has been held, that a bequest of a sum of money to be applied in paying off a mortgage debt on a meeting-house cannot be supported; *Corbyn* v. *French*, 4 Ves. 418; and the circumstance that the incumbrance on the chapel is equitable only is immaterial. *Waterhouse* v. *Holmes*, 1 Sim. 162.

Bequest on condition of another providing land, void.

In the case of *Attorney-General* v. *Davies*, 9 Ves. 543, Sir *William Grant* intimated a strong opinion that money could not be given to be laid out in building, on condition of another person providing the land, observing that it was an absurd distinction that a testator shall not give land to a charity, but may give money in consideration of another's giving land. However, where a bequest for the erection of a school-house is so framed as not to authorize the application of the money to the purchase of lands, and not to wait until, or be conditional upon, the event of land being provided by others, (though the testator expresses his expectation that lands will be so provided), it is indisputably valid. *Henshaw* v. *Atkinson*, 3 Mad. 306.

Legacy founded on an illegal devise void.

Where a legacy, which standing alone would be valid, is founded upon and derives its purpose and object from an illegal devise, it is necessarily involved in the failure of such devise. Thus, if a testator, after devising certain messuages to be converted into alms-houses, bequeaths the interest of a sum of money to the occupiers of such houses—as the devise is clearly void, the legacy is equally so. *Attorney-General* v. *Goulding*, 2 B. C. C. 428; *Attorney-General* v. *Whitchurch*, 3 Ves. 141; *Limbrey* v. *Gurr*, 6 Madd. 151; *Price* v. *Hathaway*, Id. 304. Or if a testator devises a messuage to be used as a school-house for the education of poor children, and bequeaths a fund to trustees, with a direction to apply the income in keeping the school-house in repair and providing a master, the statute, by invalidating the devise of the house, deprives the pecuniary legacy of its object, which consequently fails; *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270 (*b*); and in some other instances presenting not quite so sim-

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(*a*) As to the evidence required in these cases that the land on which the expenditure is to be made has been effectually devoted to charity, *vide Ingleby* v. *Dobson*, 4 Russ. 342.

(*b*) In cases the converse of this, namely, where the valid gift is the primary one, and the invalid gift is ancillary and subordinate to it, the former, of course, is not affected by the illegality of the latter. *Blandford* v. *Fackerell*, 4 B. C. C. 394.

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ple and obvious an application of the principle, a bequest, valid in itself, has been held to fail from the impracticability of the general scheme, of which it forms a part. *Grieves* v. *Case*, 4 B. C. C. 67.

Effect where the proportion applicable to a valid purpose can only be ascertained through an illegal devise

So where the proportion of a fund, which is made applicable to a proper object, depends on the previous appropriation of an adequate portion thereof to a purpose which the statute of mortmain forbids, the necessary effect of the illegality of the one is to defeat the other. Thus, if a testator bequeaths a sum of 5000*l.*, part to be applied in erecting alms-houses, and the residue to St. Thomas's Hospital, the failure of the first object is fatal to the second, the erection of the alms-houses, which is not permitted, being necessary to ascertain the proportion intended for the hospital. *Attorney-General* v. *Davies*, 9 Ves. 535; *Limbrey* v. *Gurr*, 6 Madd. 151; *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270.

Equity will not execute a trust which is within the statute.

It is to be observed, that if a legacy, which is directed to be laid out in land, is actually paid, (the party paying it not availing himself of the statute) and the trustee lays it out accordingly, the Court will not execute the trust. *Attorney-General* v. *Ackland*, 1 Russ. & M. 243.

The preceding decisions shew that ever since the passing of the statute of 9th Geo. 2, the Courts of law have warmly and zealously seconded the design of the Legislature, and this is still more strikingly displayed by some doctrines not yet adverted to. One of these is, that the statute cannot be evaded by a secret trust, so that the heir can compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity. *Boson* v. *Statham*, 1 Eden, 508; *Muckleston* v. *Brown*, 6 Ves. 52; *Martin* v. *Hatton*, cit. Id. 61; *Stickland* v. *Aldridge*, 9 Ves. 516; *Paine* v. *Hall*, 18 Ves. 475. And such promise, if denied by the devisee, may be proved by evidence *aliunde*. *Edwards* v. *Pike*, 1 Cox, 17, S. C. 1 Eden, 267. The trust, by whatever means established, will vacate the devise, and let in the title of the heir. This doctrine evidently proceeds on the assumption that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and if this ground fails, the rule does not apply. As where a testator, after devising lands by a will duly attested, declares a trust in favour of charity by an unattested paper, the statute of frauds, as it would afford to the devisee a valid defence against any claim on the part of the charity, will, of course, equally defend him against any claim on the part of the heir, on the ground of the charitable trust. *Adlington* v. *Cann*, 3 Atk. 141, 9 Ves. 519. Of course, the case would have been different if the devisee had prevailed on the testator to give him the estate absolutely, under the assurance that the unattested paper was a sufficient declaration of the trust for a charity. See *Adlington* v. *Cann*, 3 Atk. 152.

Secret trust for charity affecting the conscience of the devisee.

Distinction where trust is declared by an unattested paper.

Assets not marshalled in favour of charity.

Another important and well established rule is, that assets will not be marshalled in favour of a charity, or, in other words, that where a mixed fund, consisting partly of what may be legally given to charity, and partly of what cannot be so given, as for instance, a bond debt and a mort-

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gage debt, are bequeathed for purposes, some charitable and some not charitable, the Court will not apply the part which cannot be given to charity exclusively to the other purposes, in order to render the charitable gift operative upon the remainder; but will hold the bequest of the mortgage to be void *pro tanto, i. e.* in respect of so much as would, upon a rateable distribution of the entire fund, have been applied to charitable purposes. *Attorney-General* v. *Tyndall*, 2 Eden, 207; *Middleton* v. *Spicer*, 1 B. C. C. 201; *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *Makeham* v. *Hooper*, 4 Id. 153. So, where a general residue, consisting partly of what cannot be legally devoted to charity, as leaseholds or mortgages, is bequeathed to a charity after payment of debts or legacies, these charges will not be thrown exclusively on the leaseholds and mortgages, in order to leave the remainder of the personal estate for the residuary bequest to operate upon, but the debts or legacies will be paid *pro ratâ* out of the entire property, and the unapplied portion of the leaseholds and mortgages will go to the next of kin, and the unapplied portion of the rest to the charity. *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *Howse* v. *Chapman*, 4 Ves. 542; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 373; *Curtis* v. *Hutton*, Id. 540; *Currie* v. *Pye*, 17 Ves. 464.

Custom of London.

It has been thought that the statute does not affect the custom of London, by virtue of which, resident freemen were enabled to devise their lands in mortmain; but the point is doubtful, as the act makes no saving of local customs. At all events, it is clear that the custom applies only to lands in London. *Middleton* v. *Cater*, 4 B. C. C. 409.

Exception in favour of the English Universities, and Eton, Winchester, and Westminster.

The exception in the act relating to gifts to the English Universities and their colleges, and the three colleges of Eton, Winchester, and Westminster, requires to be noticed. Many instances of such devises occur in the reported cases of *Emanuel College* v. *Bishop of Norwich*, 4 B.C.C. 482; *Attorney-General* v. *Andrew*, 3 Ves. 641; *Attorney-General* v. *Bowyer*, Id. 725. It has never been decided whether the proviso extends to colleges founded since the act, as Downing College, Cambridge. In the case of *Attorney-General* v. *Tancred*, 1 Eden, 16, Lord *Northington* threw out an opinion that it was confined to colleges antecedently established; but Lord *Loughborough* appears to have dissented from this opinion. See *Attorney-General* v. *Bowyer*, 3 Ves. 728. It is clear, that the statute renders valid the devise, as well of the legal estate as of the equitable interest; *Benet College* v. *Bishop of London*, 2 W. Black. 1182; but, of course, it does not authorize devises of lands to colleges in trust for other charitable objects; *Attorney-General* v. *Tancred*, 1 Eden, 15, S. C. 2 W. Blackst. 90 (*a*); *Attorney-General* v. *Munby*, 1 Mer. 127; but it seems not to be essential that the trust should embrace the whole college.

(*a*) In this case the devise to the college embraced other charitable

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A trust for the benefit of particular members would be within the proviso; and therefore, a devise to the Master and Fellows of Christ's College, in trust that they and their successors should apply the rents for some undergraduate student, has been held to be good. *Attorney-General* v. *Tancred*, 1 Eden, 10. But the devise must be for collegiate or academical purposes; and a gift to the college, for the benefit of an individual member (the senior fellow for the time being) who was to live in the house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle. *Attorney-General* v. *Whorwood*, 1 Ves. sen. 534. The restriction imposed by the statute of 9 Geo. 2, on the number of advowsons to be held by the colleges in the Universities is repealed by the stat. 45 Geo. 3, c. 101. It appears to have been the opinion of Lord *Loughborough*, in the case of *Attorney-General* v. *Andrew*, 3 Ves. 322, that, if a devise of real estate to a college was refused by the college, it might, as the lands were originally devised to a valid purpose, be executed *cypres*.

Exception in favour of Scotland.

The exception made by the act in favour of property in Scotland has been held to point at the locality of lands only, precluding, therefore, the devise of lands in England to a Scotch charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to *some* kinds of charity. *Oliphant* v. *Hendrie*, 1 B. C. C. 571; *Curtis* v. *Hutton*, 14 Ves. 536; *Mackintosh* v. *Townsend*, 16 Ves. 330; *Attorney-General* v. *Stewart*, 2 Mer. 143; *Attorney-General* v. *Mill*, 3 Russ. 328. It has been held, that the circumstances that the charity is Scotch, and that trustees to be chosen for administering it are to be Scotchmen, do not conclusively shew that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute. *Attorney-General* v. *Mill*, 3 Russ. 328.

Purchase of lands in Ireland.

So, of course, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good, (see *Campbell* v. *Earl of Radnor*, 1 B. C. C. 272), no act corresponding with the English mortmain act having been passed by the Irish Legislature before the union, or by the Parliament of the United Kingdom since. *Attorney-General* v. *Power*, 1 Ball & Beatty, 154. The statute has also been decided not to apply to the British colonies. *Attorney-General* v. *Stewart*, 2 Mer. 141. "Framed as the mortmain act is," said Sir *William Grant*, in his very able judgment in this case, "I think it is quite inapplicable to Grenada or to any other colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country."

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objects; but the Court nevertheless held, that the college took the whole beneficially. See also *Blandford* v. *Fackerell*, 4 B. C. C. 394.

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Statutes allowing land to be devoted to particular charities.

The Legislature has, in several instances, abandoned the policy which dictated the statute under consideration in favour of particular objects. Thus, by the land tax redemption act, (42 Geo. 3, c. 116, s. 50, stated *ante*, Vol. 3, p. 404, 2nd ed.) money may, by will or otherwise, be given to be applied in the redemption of the land tax on hereditaments settled to charitable uses. So, the stat. 43 Geo. 3, c. 107, authorizes the devise of lands to the governors of Queen Anne's bounty; and again, the stat. 43 Geo. 3, c. 108, empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy of the Church of England is used, or any manor-house for the residence of the minister, or any out-buildings, offices, churchyard, or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre. The statute of mortmain has also been repealed, *pro tanto*, in favour of the British Museum, (see stat. 5 Geo. 4, c. 39), and probably of some other public institutions. See stat. 19 Geo. 3, c. 23, authorizing gifts of land to the Bath Infirmary. *Makeham* v. *Hooper*, 4 B. C. C. 153.

As to bequests of personalty.

The statute of 9 Geo. 2, leaves the disposition of personal estate, other than chattel interests in land, quite unrestrained, except where directed to be laid out in land; so that, with this qualification, a man may, by his will, bequeath his whole personal estate to charitable purposes, in despite of the claims of his nearest kindred; and, by a rule of construction peculiar to charitable gifts, if the donor declares his intention in favour of charity in general, without any specification of objects; or even if he refers to a past or future specification which he never has made, or does not afterwards make; or if the gift is to a charity which has ceased to exist, or is illegal, (being for the propagation of doctrines of religion, which the law does not sanction, 7 Ves. 490), or which refuses to accept the proffered bounty; though by this means the particular object is become impracticable or unascertainable; yet the main and substantial purpose being charity, that purpose will not be defeated by the failure of the particular object, but the trust will be executed *cypres*, *i. e.* the Court of Chancery, or the Crown, by *sign manual* (*a*), will direct its application to some existing purpose consistent, so far as may be, with the spirit of the testator's design. *Anon.* Freem. Ch. Cas. 262; *Baylis* v. *Attorney-General*, 2 Atk. 249; *De Costa* v. *De Pas*, Amb. 228, S. C. cit. 7 Ves. 76; *Attorney-Ge-*

Cypres doctrine applied to charitable gifts.

(*a*) Where the bequest is *to trustees* for charitable purposes, the administration devolves upon the Court, and a scheme is ordered to be laid before the Master for the application of the fund; but where no trustee is interposed, the *sign manual* of the King, as *parens patriæ*, is required. *Paice* v. *Archbishop of Canterbury*, 14 Ves. 372.

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neral v. *Herrick*, Amb. 712; *White* v. *White*, 1 B. C. C. 12; *Attorney-General* v. *City of London*, 3 B. C. C. 176; *Moggridge* v. *Thackwell*, Ib. S. C. 1 Ves. jun. 464, 7 Ves. 36; *Attorney-General* v. *Andrew*, 3 Ves. 633; *Bishop of Hereford* v. *Adam*, 7 Ves. 324; *Cary* v. *Abbott*, Id. 490; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 374; *Mills* v. *Farmer*, 1 Mer. 55; *Legge* v. *Asgill*, Turn. & Russ. 265, n. (*a*). In some instances, however, the testator's intention has been considered to be so distinctly marked in favour of a specific object, as not to warrant the extension of the gift to any other; *Attorney-General* v. *Axford*, 1 B. C. C. 444, n.; *Grieves* v. *Case*, 4 B. C. C. 67; and in other cases the trust created by the testator has been conceived in terms so vague and ambiguous, not merely as to the nature of the charitable purposes, but as to the fact of charity being the object at all, that it has been held to be void, and the beneficial property devolved to the next of kin. See cases stated *ante*, p. 26.

Where the Court will pay legacies to a charity without a scheme.

Where a pecuniary legacy is absolutely bequeathed to a corporation constituted for charitable purposes, the Court will direct payment without requiring that a scheme be settled by the Masterfor its appropriation. *Society for the Propagation of the Gospel in Foreign Parts* v. *Attorney-General*, 3 Russ. 142. And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution. See *Wellbeloved* v. *Jones*, 1 S. & S. 43. But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts which the testator has pointed out, the Court will take upon itself to insure the accomplishment of the testator's object by referring it to the Master to settle a scheme. *Ibid.*

Cypres doctrine not applied to cases within the stat. 9 Geo. 2, c. 36.

The doctrine of *cypres* ought not to be dismissed without pointing the attention of the reader to the strenuous and undeviating refusal of the Courts to apply the doctrine to bequests which are vacated by the statute of 9 Geo. 2, c. 36. Not only is a bequest of money to be laid out in land not executed *cypres*, (as a bequest which is illegal on some other grounds would be executed, *Cary* v. *Abbott*, 7 Ves. 490); but it has even been held that an express clause, importing that, in case the charity could not, by law, take effect in the manner expressed, the trustees were to dispose of the property to such charitable uses as should be as near to the intention before expressed as might be, and the laws of the land would permit, did not authorize the Court to apply it to a valid charitable purpose. *Attorney-General* v. *Tyndall*, 2 Eden, 207. (Observe also the exclusion of the *cypres* doctrine in the case of *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270, and other cases cit. *ante*, pp. 31, 32).

(*a*) These cases seem to have overruled the case of *Brown* v. *Heale*, 7 Ves. 50, n., the authority of which was also expressly denied by Lord *Eldon* in *Morice* v. *Bishop of Durham*, 10 Ves. 539.

RULE AGAINST PERPETUITIES.

2. *Rule against Perpetuities.*

Rule against perpetuities, what.

The rule against perpetuities is that rule of public policy which prohibits the suspending of the absolute ownership in real or personal estate, beyond a certain period. The new modifications of estate consequential on the introduction of uses, first drew attention to the necessity of imposing some restraint of this nature, though they did not wholly create that necessity; for, if uses had never existed, some restriction would have been necessary on executory and future interests in personal estate, analogous to that rule of the common law concerning remainders, which precluded (and still precludes) the limitation of lands to an unborn person for life, with remainder to his issue; *Somerville* v. *Lethbridge*, 6 D. & E. 213; *Beard* v. *Westcott*, 5 Taunt. 393; *Hayes* v. *Hayes*, 4 Russ. 311; or, as it was clumsily expressed, the limiting of a possibility upon a possibility. For some time, the Judges had no very distinct notions of the restrictions to be placed on springing uses and executory devises (*a*), of whose evil tendency, as promotive of perpetuities, they one and all expressed the utmost apprehension. A life in being was first reluctantly conceded, *Duke of Norfolk's case*, 3 Ch. Cas. 1; but was soon perceived to involve the allowance of any number of co-existing lives, whose utmost measure of duration is only that of the life of the survivor. *Thellusson* v. *Woodford*, 4 Ves. 227, 11 Ves. 112, 1 New Rep. 357. It was then held, that a life or lives in being and *a little more* was allowable. Thus, where a testator devised to his wife for life; remainder to C., his second son, in fee, provided that if D., his third son, should, *within three months after his (testator's) wife's decease*, pay 500*l.* to C., his executors, &c.; then he devised the same lands to D. and his heirs: this was held to be a good executory devise to D. *Marks* v. *Marks*, 1 Stra. 179, S. C. 10 Mod. 420, Fea. C. R. 432.

Gradual establishment of the present rule.

A life and three months allowed.

(*a*) In the discussion in the text, it has been assumed that the reader is acquainted with the distinction between contingent remainders and executory devises, rendered familiar to every one by the admirable treatise of Mr. Fearne. The result of the elaborate definition of a remainder, contained in that work, is, that it is a limitation expectant on the expiration of a particular estate of freehold created by the same instrument. An executory devise is a devise of a future estate or interest, which cannot take effect as a remainder; or, in other words, of a future interest which is not to arise on the expiration of a precedent particular estate of freehold created by the same will. If there is no preceding estate of freehold, or if the future interest takes effect in derogation of such estate, or an interval *necessarily* occurs between the expiration of the one and the taking effect of the other, the future estate is executory.

Distinction between a remainder and an executory devise.

RULE AGAINST PERPETUITIES.

A life and one year.

So, where lands were limited by marriage settlement to the use of A. and his wife for their lives, remainder to trustees and their heirs during the lives of A. and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail male; remainder to the right heirs of A., with a proviso that if the heirs of the wife should, *within one year after the death of the survivor of the husband and wife*, pay 4000*l.* to the heirs or assigns of the husband, then the fee should remain to the use of the heirs of the wife: the House of Lords held the executory limitation to the heirs of the wife to be good. *Lloyd* v. *Carew*, Pre. Ch. 72, S. C. Show. P. C. 137, Fea. C. R. 432.

Gift to unborn person to vest at twenty-one, good.

It was next decided that an executory limitation to the unborn child of a living individual (and who must necessarily come in *esse* during a life in being and the period of gestation) (*a*), to take effect at his or her majority, reaching, therefore, possibly to a period of a life and twenty-one years, and nine or ten months afterwards, was valid. This point was recognised in the case of *Stephens* v. *Stephens*, Cas. Temp. Talbot, 228, where A. devised lands to W. and his heirs; and if W. should die before the age of twenty-one, then to T., his heirs and assigns; but in case T. should die before twenty-one, then to such other son of M. (who was the mother of the prior devisees), *as should happen to attain his age of twenty-one years*, his heirs and assigns for ever. W. and T. having died under twenty-one, it was held, by Lord Chancellor *Talbot*, in accordance with a certified opinion of the Court of King's Bench, that the executory devise over to the other son of M. was good. In this case, it will be observed, M. (if she had been the paternal parent) might have died, leaving a child *en ventre sa mere*, so as thereby to prolong the suspension of the vesting for nine or ten months, in addition to the life and infancy. Indeed, if the prior devisee, on whose death under twenty-one the devise over was limited to arise, had been an infant *en ventre sa mere*, another period of nine or ten months would have been gained, making an aggregate period of a life, twenty-one years, and a double allowance for gestation: thus exhibiting the extreme point to which the postponement of the vesting can, under any possible circumstances, be pushed. It ought to be observed, however, that no adjudged case has in its circumstances presented such an instance. In *Long* v. *Blackall*, 7 D. & E. 100, S. C. 3 Ves. 486, a limitation over to P. L., on the failure of issue male living at the death of a child *en ventre sa mere*, if a son, was held to be valid, on the ground that a double period of gestation (which would have occurred in case such child had died leaving issue male then *en ventre sa mere*) was allowable; but the vesting of the gift to P. L. was immediate on that event,

Extreme period allowed by the rule.

(*a*) This additional period could only occur where the gift was to the children of a *man*.

RULE AGAINST PERPETUITIES.

and was not postponed until the age of twenty-one. There can be little doubt, however, that the Courts would hold, that, for all the purposes of the rule in question, a child *en ventre sa mere* is to be regarded as a person in existence.

Whether suspension for an absolute term of twenty-one years is allowable.

Still, the preceding cases left it undecided whether the period which the rule allowed to be added to a life was merely the infancy of the object of the future limitation (as in *Stephens* v. *Stephens*), or was an absolute term of twenty-one years irrespective of such infancy. The cases of *Marks* v. *Marks*, and *Lloyd* v. *Carew*, had certainly made a considerable inroad upon the latter hypothesis; for, in *Marks* v. *Marks*, an executory limitation to take effect in three months, and in *Lloyd* v. *Carew*, an executory limitation to take effect in twelve months after the expiration of a life, was held to be valid, and it could scarcely be contended that if *any* absolute term were allowed, that term might be less than twenty-one years; for there seems to be no principle or authority for drawing an intermediate line (*a*). Another argument in favour of the absolute term is, that the contrary doctrine would involve the denial of any certain period of postponement at all; and an executory devise, to take effect in ten or twenty years, even without a life, would be void.

In spite of these considerations, and notwithstanding that the rule had been more than once stated by Lord *Kenyon*, 1 Cox, 325, 7 D. & E. 100, in a manner affirming the allowance of an absolute term (though, probably, without any distinct view to the point now under discussion); yet a writer, whose opinion carried great weight, Gilb. Us. by Sugd. 260, (2), strongly advocated the contrary doctrine; in which he was countenanced by the remark which had fallen from Lord *Alvanley* in *Thellusson* v. *Woodford*, 4 Ves. 377, "that the period of twenty-one years had never been considered as a term that might, at all events, be added to the executory devise or trust." The point at length arose in the case of *Beard* v. *Westcott*, 5 Taunt. 393, 5 Barn. & Ald. 801, 1 Turn. & Russ. 25, S. C.; one of the questions in which respected the validity of an executory limitation in a will of great prolixity, limited to take effect "in case there should be no issue male of J. J. B. (a prior devisee), nor issue of such issue male at the time of his death (*b*), or in case there should be such issue male *at* that time, *and they should all die before they should respectively attain twenty-one.*"—J. J. B. died, leaving issue at his death. On a case sent from Chancery to the Court of Common Pleas,

Case of *Beard* v. *Westcott*.

(*a*) *Sed. vide* Mr. Baron *Bayley's* judgment in *Cadell* v. *Palmer*, *post*, p. 43, which the Editor did not see until the observations in the text had been sent to the press.

(*b*) If this branch of the alternative had happened, *i. e.* if there had been no issue male living at the death of J. J. B., the devise over would have been good in event, according to the doctrine stated *post*, p. 54.

RULE AGAINST PERPETUITIES.

Conflicting certificates of the Common Pleas and King's Bench as to the allowance of a term irrespectively of the infancy of the object to take.

this Court certified in favour of the devise. The case was then returned to the Judges of the Common Pleas, their attention being specially pointed to the circumstance that the executory devise was to take effect after an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or that there might be issue of J. J. B. living at his death, who could not take under the prior limitations (in which an attempt had been made to limit terms determinable with life to the issue born and unborn, *ad infinitum*). The Court persisted in affirming the validity of the devise. A case was then sent to the Court of King's Bench, who certified the devise to be invalid (*a*); and Lord *Eldon*, before whom these conflicting certificates were brought, affirmed that of the Court of King's Bench, in order "to help the case to the House of Lords," (which, however, it never reached); his Lordship expressing the inclination of his opinion to be, that the Court of King's Bench was right.

The anxiety of testators and settlors to avail themselves of the utmost limit of the perpetuity doctrine did not permit that limit long to slumber in the obscurity in which the case of *Beard* v. *Westcott* had left it; for a similar question was soon afterwards raised on the will of Mr. Bengough, a gentleman of large property, resident and formerly a solicitor at Bristol. The testator, by his will, dated April 9th, 1818, devised all the residue of his real estate unto and to the use of trustees, their heirs and assigns; upon trust (after paying certain annuities), from time to time, during the term of twenty-one years, to be computed from the day of his (testator's) decease, to receive the rents, and lay out the same, as often as there should be a surplus amounting to 1500*l.*, in the purchase of freehold estates of inheritance; and the testator directed that the estates so to be purshased, should be conveyed to the use of the trustees, upon the trusts *thereinafter* (*b*) declared concerning the real estate devised to them. After providing for the investment of the monies in the funds until a purchase could be made, the testator declared the trusts of his real estate as follows:—viz. that the trustees should stand possessed of the said trust estate for the term of one hundred and twenty years, to be computed from his decease, if several persons named (and who amounted in number to twenty-eight), or any or either of them, should so long live, *and also for the term of twenty years, to be computed from the ex-*

Will of Mr. Henry Bengough.

Suspension of vesting for one hundred and twenty years determinable with lives in being, and twenty years absolutely.

(*a*) *Vide* Mr. Baron *Bayley's* explanation of the grounds of this certificate in *Cadell* v. *Palmer*, *post*, p. 48.

(*b*) The effect of this word literally construed would have been to exclude the after-purchased estates from the trust for accumulation, which was *antecedently* created; but the Vice-Chancellor considered himself to be warranted by the context to construe the word as inserted by mistake for "herein," or "hereinbefore."

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piration or sooner determination of the said term of one hundred and twenty years determinable as aforesaid, in trust for testator's nephew, George Bengough, for ninety-nine years, if he should so long live, and the terms of one hundred and twenty years, determinable as aforesaid, and twenty years, or either of them, should so long continue; and after the expiration or sooner determination of the said term of ninety-nine years, in trust for the first and other sons of the said George Bengough successively, according to the priority of their births; "and after the determination of the estate and interest of each of the same sons respectively, and also as the circumstances of the case should require, after the determination of the estate of any person taking, from time to time, under, or as answering to the description of heir male of his body, in trust for the person who, for the time being, and from time to time, should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to such son and the heirs male of his body; to hold to the same son or person respectively, for a term of ninety-nine years, if the same son or person respectively should so long live, and the said terms of one hundred and twenty years, determinable as aforesaid, and twenty years, or either of them, should so long continue; every elder of the same sons, and the person who for the time being, and from time to time, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being," &c.; remainder to numerous other persons and their sons, and the persons from time to time answering to the description of heirs male of their bodies, in the same manner; with an ulterior trust for the person or persons who for the time being should answer to the description of testator's heir or heirs at law, and if there should be more than one, in the same shares as they would be entitled to a real estate, descending from him (the testator) as the first purchaser; to hold to such person or persons, if more than one, as tenants in common, if the same person or persons should so long live, and the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, should so long continue. The testator then provided, that in case the trusts could not take effect in the order intended, by reason that the persons entitled were not then born, the income during such suspension of ownership should be enjoyed by the persons next in remainder. And the testator then directed, that, after the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, the said trust estates should be settled by his trustees to and upon such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, or in tail, or in fee, in

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the same trust estates, if the same trust estates were by that his will devised, settled, or assured, in manner or to the effect following, that is to say, to the use of his nephew, George Bengough, and his assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male, with various remainders over. The testator then went on to direct that the person or persons to whom such conveyances should be made, should have such estates in the said trust estates, as he or they would at that time be entitled to take under the said limitation, if actually made by his said will; yet, nevertheless, he directed and declared that no person should have a vested estate or any other than a *contingent* interest, until the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years; and that in the event and in the mode thereinbefore expressed, heirs and heirs of the body should be entitled to take as purchasers. The testator then directed, that if during the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, each or either of the persons who should be entitled to the income of his said trust estates, should require the same, it should be lawful for the trustees to convey to him or her an estate of freehold, for his or her life, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years determinable as aforesaid.

The testator also bequeathed the residue of his personal estate to the same trustees, their executors, administrators and assigns, upon trust, during the period of twenty-one years from his decease (*a*), to receive the annual income thereof, and invest the same, and the accumulations thereof, in the 3*l. per cent.* Consolidated Bank Annuities, or upon mortgage, so as to form an accumulating fund, and from time to time lay out the same in the purchase of lands, to be settled upon the trusts before declared of his devised estates. The question as to the validity of the devises, the vesting of which was suspended for the terms of a hundred and twenty years determinable with lives, and twenty years absolutely, was raised upon a bill filed by the heir-at-law against the trustees.

Decree of the Vice-Chancellor in favour of the validity of the devises.

After an elaborate argument, Sir *J. Leach*, V. C., held the limitations in the will to be valid, observing, "that although the rule be framed by analogy to the case of a strict settlement, where the twenty-one years was allowed in respect of the infancy of the tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one

(*a*) It is evident that the Thellusson act (40 Geo. 3, c. 98, *post*) alone restrained this testator from creating an accumulating trust no less extensive than that of Mr. Thellusson.

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years after lives in being." *Bengough* v. *Edridge*, MS., also reported 1 Sim. 173. Against this decree the plaintiff appealed to the House of Lords, which, on the 30th May, 1833, put to the Judges several questions, which are referred to in their opinion delivered by Mr. Baron *Bayley*, who addressed the House as follows:—

Opinion of the Judges delivered by Mr. Baron *Bayley*.

"My Lords—The first question proposed by your Lordships' House for the consideration of his Majesty's Judges is this—'Whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person;' and I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property, which was the subject of them, should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd* v. *Carew*, 1 Show. Parl. Cas. 137, in the year 1696, and *Marks* v. *Marks*, 10 Mod. 419, in the year 1719, established the point, that for certain purposes such time, as with reference to those purposes might be deemed reasonable beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate, and twelve months in the first case, and three months in the other were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor* v. *Bidall*, 2 Mod. 289, 1677, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Wharton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed

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by and was the foundation of the decision in *Stephens* v. *Stephens*. That was a case of infancy also. The executory devise there was, 'to such other son of the body of my daughter, Mary Stephens, by my son in law, Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns, for ever;' and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar. It refers to *Taylor* v. *Bidall*, and says that, however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be restrained longer than the law would restrain it, namely, during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated, they were of opinion that that devise was good by way of executory devise.' This was also a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though under that limitation the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These, decisions, therefore, do not distinctly or necessarily establish the position that a term in gross, for twenty-one years, without any reference to infancy, after a life or lives in *esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle* v. *Wood*, in Lord Chief Justice Willes's Reports, 213, and also in a note in 7 Term Reports, p. 103, Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, the doctrine of executory devises has been settled; they have not been considered as bare possibilities but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been under some restraints to prevent perpetuities. At first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child *en ventre sa mere* at the time of the father's death; because, as the contingency must necessarily happen within less than nine or ten months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being, as in that case,

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likewise, there is no danger of a perpetuity; and in citing this passage in *Thellusson* v. *Woodford*, 1 H. Bl. Rep. 388, Lord Chief Baron *Macdonald* prefaces it by this eulogium—'The result of all the cases is thus summed up by Lord Chief Justice *Willes*, with his usual accuracy and perspicuity;—he does, indeed, afterwards say, (page 393), after noticing *Long* v. *Blackall*, the established length of time during which the vesting may be suspended is a life or lives in being, the period of gestation, and the infancy of such posthumous child;' and that rather implies that he thought the rule was confined to cases of minority. This opinion, though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person in *esse*, without reference to any minority, had been allowed; and though there be no such case reported, it does not follow that none such was decided. In *Goodtitle* v. *Goodman*, Burrow, 879, is this passage—Lord Chief Justice *Mansfield* says—'It is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after,' (which is the line now drawn, and very sensibly and rightly drawn). This was published in 1766; and whether the last approving paragraph was the language of Lord *Mansfield* or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth* v. *Thirkell*, 3 Bos. & Pul. 654, mentioned in a note, Lord *Mansfield* says—'I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards.' In *Gee* v. *Audley*, 1 Cox, 325, Lord *Kenyon*, Master of the Rolls, says—'The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of the Judges of all times, from the *Duke of Norfolk's case* to the present time; it is grown reverend by age, and is not now to be broken in upon.' In *Long* v. *Blackall*, 7 T. R. 102, Lord *Kenyon*, the same learned Judge, says—'The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have stated that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements, the estate may be limited to the first and other sons of the marriage in tail; and until the person to whom the last remainder is limited is of age, the estate is inalienable. In conformity to that rule, the Court have said, so far we will allow executory devises to be good.' And, after referring to the *Duke of Norfolk's case*, he concludes—'It is an esta-

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blished rule that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation.' In *Wilkinson* v. *South*, 7 T. R. 558, Lord *Kenyon* again says—'The rule respecting executory devises is extremely well settled, and a limitation by way of executory devise is good, if it may'—I think it should be *must*—'take place after a life or lives in being, and within twenty-one years and the fraction of another year afterwards.' We would not wish the House to suppose that there were not expressions in other cases about the same period, from which it might clearly be collected that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice *Blackstone*, in his Commentaries, puts, as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for, Courts of justice will not indulge even wills, so as to create a perpetuity; the utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is, that of a life or lives in being, and twenty-one years afterwards; as when lands are devised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way.—'An executory devise to vest within a short time after the period of a life in being is good,' as in *Lloyd* v. *Carew*, which he states, and *Marks* v. *Marks;* and he says—'The Courts, indeed, have gone so far as to admit of executory devises limited to vest within twenty-one years after the period of a life in being, as in *Stephens* v. *Stephens*, *Taylor* v. *Biddall*, *Sabbarton* v. *Sabbarton;*' all of which he states, and in all of which vesting was postponed on account of minority only; and then he draws this conclusion—'so that the law seems to be now settled, that an executory devise, either of real or personal estate, which must, in the nature of the

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limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates.' The instances put—all instances of minority—might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to *Blackstone;* that such was his understanding may be collected from many other passages in his book, but from none more distinctly than in the third division of his first chapter on Executory Devises, 7th edition, pages 399 and 401; where, after having mentioned, as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee; and, after putting several instances, he then concludes the division thus:—'And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose) next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises.' And in his third chapter, page 470, he begins his eighth division with this position—'It is the same (that is, that an executory devise is not too remote), if the dying without issue be confined to the compass of twenty-one years after the period of a life in being.' And in the eighth division of Chapter 4, p. 177, he says—'It seems now to be settled, that, whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in the event of no one of the preceding limitations which would carry the whole interest happening to vest.' My Lords, the opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson* v. *Woodford,* in 4 Ves. 337, shewing a doubt existed in the mind of Lord *Alvanley,* that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from any thing expressed by his great and experienced Editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated that his opinion was in conformity to it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was, that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard* v. *Westcott,* 5 Taunt. 393, the question, whether an executory devise was good, though it was not to take

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effect till the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir *William Grant*, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812, the next in November, 1813; and the Judges who signed them were Sir *James Mansfield*, Mr. Justice *Heath*, Mr. Justice *Lawrence*, Mr. Justice *Chambre*, and Mr. Justice *Gibbs*, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1322, when the same case was sent by Lord *Eldon* to the Court of King's Bench; and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation clearly too remote, and which was so considered by the Common Pleas, made those limitations also void, which the Common Pleas held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation, and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion upon that, I am unable to say. I think the Court of King's Bench would have taken much more time to have considered that point than it did, and have given it greater consideration than it received if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial in the construction they were putting upon the will, to consider whether they were or not prepared to differ from the Court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Common Pleas in *Beard* v. *Westcott*, and the *dicta* by Lord Chief Justice *Willes*, and Lord *Mansfield*, and Lord *Kenyon*, and the rules laid down in Blackstone and Fearne, we consider ourselves warranted in saying, *that the limit is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever*. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon the authority of the *dicta* or text writers I have named; and it will not tie up the alienation an unreasonable length of time. Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void,

as too remote, or otherwise if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. *They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists.*

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Lord *Brougham*, C.—"Your Lordships having heard the answer of the learned Judges in this very important case, it must be exceedingly satisfactory to your Lordships, feeling the importance and advantage of having a fixed and general rule upon a subject of this kind, to find that their Lordships have, after the fullest consideration, and after hearing this question argued at great length, come to the resolution they have stated to your Lordships. My Lords—with regard to the questions proposed, the first question was moulded on purpose to raise the difficulty that had been very much pressed at the bar, arising upon the manifest origin of this rule, it appearing, clearly, that it was originally not a term of twenty-one years in gross any more than it now will be a term of twenty-one years and nine or ten months, but that it was originally introduced in consequence of the supposition of infancy with which that question was connected; but, whatever may have been the origin of the rule, it appears now to have become an inveterate rule, and may be said to be established by decisions and dicta. One of the earliest of the cases that have been cited was wholly unconnected with infancy. I allude to the remarkable case of *Lloyd* v. *Carew*, in Shower's Parliamentary Cases, which is the more worthy of attention as it must have received the fullest consideration, for it was a decision of the Court of the last resort, and it was a decision reversing the judgment of the Court below, that being a judgment of the Court of Chancery assisted by the Lord Chief Justice of the Court of Common Pleas and one of the other learned Judges, and the decision pronounced by that Court, under those circumstances, clearly shewing the attention paid to it, in all its stages, would not have been reversed by this House without the most full and elaborate consideration. That circumstance gives the case of *Lloyd* v. *Carew* a weight beyond what, under the other circumstances, it would receive, and entitles it, in all cases, to great consideration; it shews that the whole argument upon the matter must have been fully gone into, and that your Lordships' House must have been fully acquainted with the difficulty now stated of considering any thing beyond a life or lives in being in gross, and unconnected with any thing else as decisive. My Lords—some doubt was expressed, and there was, perhaps, some ground for it, whether

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this had been the uniform opinion of the conveyancers in their practice. I think it is impossible to read the passages in Fearne to which reference has been made by Mr. Baron *Bayley*, and to have any doubt that he considered it a matter so clear, that he did not make it a ground for discussion or argument, but takes twenty-one years as the period admitted to be the rule. The learned editor of that work issued various editions of it, until the questions arose in the Court of Chancery in *Thellusson* v. *Woodford*, and the opinion of Lord *Alvanley*, the Master of the Rolls, was then brought into consideration, and gave rise to the part that has been added in the subsequent editions of the work; and Mr. Butler, in the last edition, which is not here, makes it the subject of a separate paper. This was after the case of *Thellusson* v. *Woodford*, which was ultimately decided by this House; and I have no doubt that Mr. Butler would have treated the subject in the same way as it had been treated by Mr. *Fearne*. The opinion of Lord *Mansfield*, in the case cited of *Taylor* v. *Bidall*, is very strong to the same purpose; as, though what has been cited from Lord *Kenyon*, both when at the Rolls and in the Court of King's Bench, refers to the period of gestation, and might be supposed to prove too much; yet the current of all the other authorities certainly is confined to twenty-one years, and leaves no doubt of that which has been so soundly stated by the learned Judges in their opinion. My Lords—it was necessary to state the first question with the view of raising the difficulty, and letting the Judges have their attention called to it, that they might grapple with it. They have done so, and they have not shrunk from giving it their best consideration. It was equally necessary to state the second and third questions, in order that no doubt might arise upon the point as to the twenty-one years connected with infancy, and whether it might not be capable of being extended still further. The learned Judges have applied their minds to those questions, one as to the average period of gestation and the other the longest; and they are of opinion that the authorities exclude any such period from being added to the twenty-one years. If your Lordships should be of opinion with the learned Judges, and so to deal with the case of *Cadell* and *Palmer*, which has called forth this discussion, if your Lordships should be of opinion to dispose of that case according to the unanimous opinion of the Judges on the question submitted to them, the rule will henceforth be, that an executory devise is not too remote if twenty-one years is added beyond the existence of a life or lives in being, but that beyond that point any further time would be too remote." Judgment of the Court below affirmed. *Cadell* v. *Palmer*, in Dom. Proc. 25th June, 1833, MS.

Cadell v. *Palmer*, in Dom. Proc. 25th June, 1833.

The Editor has been enabled to give an early report of this important decision through the kindness of Mr. Henry Palmer, of Bristol.

To the test of this rule, the limits of which have been thus finally

settled by the highest judicial authority, every gift of real and personal estate, created by will or otherwise, must be brought. The application of such test instantly shews, that an executory limitation in a deed or will, to arise on an indefinite failure of issue, must be void for remoteness. *Badger* v. *Lloyd*, 1 Salk. 232; *Moore* v. *Parker*, 1 Lord Raym. 37; *Lady Lanesborough* v. *Fox*, Forrest, 262; though it is to be observed, that, in this and all other cases, if the executory devise is limited in defeazance of an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, by means of a common recovery, takes the case out of the mischief of, and consequently out of the rule against, perpetuities. *Gulliver* v. *Ashby*, 4 Burr. 1929. Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another, in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and wear the arms of the testator; or in case another property should devolve to him or them, or on any other such event, this executory limitation, though it would have been clearly void if annexed to an estate in fee simple, is good, as applied to an estate tail. *Nicholls* v. *Sheffield*, 2 B. C. C. 215; *Carr* v. *Earl of Erroll*, 6 East, 58.

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An executory devise to arise on an indefinite failure of issue void,

unless engrafted on an estate tail.

The same reasoning might seem to apply, in some degree, to contingent remainders not rendered indestructible by an estate created for their preservation; but the Editor is not aware of any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, were devised to A. for life, with remainder to his eldest son who should be living at his decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease, although A. in his lifetime might destroy all the remainders, and the eldest son, after his decease, might destroy the ulterior remainder in fee devised to his children, without being, in the slightest degree, amenable either at law or in equity to the persons whose estates are thus destroyed, such remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in such cases being effected by what the law calls a tortious or wrongful act, it is not to be presumed that such a wrong will be committed.

Whether a remainder, which is destructible, can be void for remoteness.

The most frequent instances of gifts rendered void by their transgressing the rule against perpetuities, occur in devises or bequests to classes comprising either individuals who are not in *esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority, or persons who do not necessarily come into existence, if at all, during a life in being, and twenty-one years afterwards.

Most frequently occurring cases of remote gifts.

An example of the former is furnished by the common case of a gift, to

Gifts to an un-

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born class, to vest after majority.

a person for life, and, after his decease, to his or her children who reach an age subsequent to majority; which, as it would, if allowed, have let in objects born after the death of the testator, and the vesting of whose shares might be postponed for more than twenty-one years after the decease of the tenant for life, is (unless in the excepted case presently noticed) necessarily void for remoteness. The books are replete with cases of vacated gifts of this nature. One of the most recent is the case of *Vawdry* v. *Geddes*, 1 Russ. & Myl. 203, where a testatrix bequeathed the produce of her residuary estate in trust for her four sisters for their natural lives, and directed, that, on their decease, the interest of their respective shares should, at the discretion of her executors, be applied in maintenance and education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two years; and, upon any of their attainment to that age, they should be entitled to their mother's share of the principal; with limitations over in case of their dying under that age. It was attempted to support the bequest upon two grounds: 1*st.* that the children of the sisters took vested interests at their birth, subject to the contingency of being divested in the event of death under twenty-two years of age. 2*ndly*, that the bequest was to be confined to children in *esse*, at the death of the testatrix; but Sir *J. Leach*, M. R., negatived both these grounds, being of opinion that the vesting was postponed to the age of twenty-two, and that the bequest let in all the children born before or after the death of the testatrix, and consequently, that the trust for the children was too remote and void. See also *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213. It is observable, that if, in *Vawdry* v. *Geddes*, any of the testatrix's sisters had died, leaving a child less than a year old, the share of such child would not have vested until more than twenty-one years after the mother's decease, and consequently not until after the period allowed by the rule of law.

Legacy to unborn children at twenty-two, held to be void for remoteness.

Distinction in regard to remainders.

It is proper to remark, that, in the class of cases under consideration, a limitation which would, as an executory devise, be void for remoteness may be good as a contingent remainder, on account of the necessity which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life, which being limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper limits. Thus, if lands of which the testator had the legal inheritance, were devised to A. for life, with remainder to his children in fee, who should attain the age of twenty-two, the devise would be good, because, if, at the decease of A., no child had attained the vesting age, the remainder would fail, under the doctrine in question. See Fea. C. R. 4.

Effect of post-

Where the vesting of a gift to unborn persons is postponed for a fixed

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term exceeding twenty-one years, not preceded by a life, the gift is necessarily void. In such a case, it will be observed the effect is precisely the same as if the vesting of the shares of such unborn persons had been protracted beyond majority, since the objects who happen to (as all may) be born more than twenty-one years before the vesting, are of course past their majority when such vesting takes place. Thus, where a testator bequeathed 2,500*l.* Bank Stock upon trust to raise an accumulated fund, and to transfer such fund unto all and every the child and children of his son C. T. H., who should be living at the expiration of twenty-eight years, to be computed from the testator's decease, except an eldest or only son; and, in case no such child should then be living, then to the children then living of J. S., another son, and in default of such child to J. S., if living, and so on to the children of two daughters whom he named, with the like substitution of those daughters—Sir *J. Leach*, M. R.—"The expressed intention of the testator is, that all the children of his son C. T. H., other than an eldest son, should take, who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than twenty-one years; and the gift, therefore, is too remote and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also (*a*)." *Palmer* v. *Holford*, 4 Russ. 403.

Postponement for more than twenty-one years without a life.

The principle of this case clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. It is clear, therefore, that a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and *two days* from the testator's decease, would be void.

Where a devise or bequest to a class, according to the state of circumstances existing at the death of the testator, may happen to comprehend objects who are beyond the legal boundary, the fact that it does not eventually comprise such objects (all the individuals actually composing the class being within the line) would not render it valid. Thus, if a sum of money were bequeathed to A. for life, and after his decease to his children who should attain the age of twenty-two years, though all the children of A.

Gifts originally void not validated by subsequent events.

(*a*) It will be perceived that his Honor pronounced all the bequests over, without distinction, to be void; though one of those bequests was to the son himself, subject to the contingency of his being alive at the expiration of the twenty-eight years, which necessarily confined it to a life in being.

Observation on *Palmer* v. *Holford*.

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happen to be born in the lifetime of the testator, and therefore might have taken under a gift confined to children so born, and attaining the prescribed age, yet, as their claim must be made as members of a class which is too remote, their individual competency can avail nothing. *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213.

Gifts bad in one event, and good in another.

Gifts, however, may be so framed as to be valid or not, according to events, bringing them within, or placing them beyond, the allowed line. An example of such a devise is afforded by a case in the House of Lords, where a testator, after devising lands (subject to certain terms for years, which he created for the purposes thereinafter mentioned) to A. for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A. in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands, under a term of sixty years (*a*), the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitations in his will, with remainder to his issue in strict settlement (*b*). When the time arrived for laying out the money, it happened that the person entitled in possession under the limitations in question was not in *esse* at the testator's death, and therefore could not be made tenant for life, with remainder to his issue; so that the trust for laying out the money had failed *in event*. *Tregonwell* v. *Sydenham*, 3 Dow, 194. The grounds on which Lord *Eldon* rested the decision of the house in this case conclusively shew, that if the person entitled in possession had been a person in *esse* at the testator's death, the trust for laying out the money would have been legal: so that the case affords an exact illustration of the doctrine in question.

Gifts alternative in substance though not in expression.

And it is to be observed that gifts may be alternative in substance, by the effect of the rule of construction applied to them, which are not alternative in expression; for instance, in the case of a gift to A. for life, and after his decease to the children of A. who shall attain the age of twenty-two years; if A. should die in the lifetime of the testator, as this event would confine the gift to persons in *esse* at the testator's decease, without the possibility, *according to events subsisting when the will takes effect*, of its comprehending a wider range of objects; such gift, it is conceived, is valid, and might be so held without any violation of the principle which precludes the construing the gift according to subsequent events, though probably not in complete coincidence with the terms in which such principle is sometimes laid down (*c*).

(*a*) This was prior to the stat. 40 Geo. 3, c. 98, *post*, 65.

(*b*) This was the effect, though not the precise language:

Some points suggested as to

(*c*) Would a devise or bequest, to such one of the children of A. as shall first marry, be void *ab initio?* or would its validity depend on the

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Where an executory gift is made in favour of too remote an object, an alternative gift, which is to arise simply in default of such object, will be also void, although the failure of the object of the prior gift occurs under circumstances which would have admitted of a valid gift over being limited. Thus, where a testator devised to the first or other son of Thomas Proctor, that should be bred a clergyman, *and be in holy orders*, and to his heirs and assigns; *but if the said T. P. should have no such son*, then to T. M., his heirs and assigns. T. P. died without ever having had *any* son. As by the canons of the church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of Common Pleas, therefore, held the first devise to be void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect. *Proctor* v. *Bishop of Bath and Wells*, 2 Hen. Bl. 358; see also *Robinson* v. *Hardcastle*, 2 B. C. C. 22, S. C. 2 D. & E. 241, 371, 380; *Cambridge* v. *Rous*, 8 Ves. 12.

Gift alternative to one too remote, also void.

Care should be taken, however, to distinguish between the cases just mentioned and those in which the second or substituted devise is not simply alternative to the first, but is made to arise also on some collateral event, as if, in the case of *Proctor* v. *Bishop of Bath and Wells*, the devise over, instead of being to take effect only in the event of T. Proctor having no *such* son (*i. e.* a son taking holy orders), had been limited to arise

Distinction where the second gift is to arise on a collateral event.

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event of A. having a child, who should marry under the age of twenty-one? If the rule be, as is often stated, that the gift must *necessarily* take effect within the period fixed by the rule of law, it would be absolutely void; but if, in applying this rule, we are to look at events existing at the testator's decease, there would be ground to contend, that, in the event of a child of A. marrying in the testator's lifetime, the gift would be good, though certainly the principle which regulates the construction according to events, at the testator's decease, is more open to exception as applied to such a case as this, than in the instance suggested in the text of a gift to a class, the objects of which are to be ascertained at that period; for a gift to the children of A., a living person, may be considered as amounting in effect to a gift to the children of A., who shall be living at my decease if A. dies in my lifetime, or to such as shall be then living and shall thereafter be born, if A. survives me. The editor, however, ought to add, that the suggestion he has ventured to offer in favour of the possible validity of devises of this nature is founded on a view of general principles alone, and not on authority; for he is not aware of any decided case bearing immediately on the point.

gifts being valid according to event.

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also in the event of his not having *any* son. Provision would then have been made for two distinct events: one, the devisee not having any son; the other, the not having a son who should take orders: and since the former would necessarily take place within the period allowed by law, and the latter would not, the validity of the devise over would depend upon whether one or the other event happened. Had the will been so framed, in the event which happened, the devise over would have been valid (*a*).

An instance of this species of limitation is afforded by the case of *Leake* v. *Robinson*, 2 Mer. 363, where certain stock and monies were bequeathed to A. for life, and after his decease to the child or children of A., who, being a son or sons, should attain the age of twenty-five, or, being a daughter or daughters, attain that age, or be married with consent; and in case A. should die *without leaving issue living at the time of his decease*, or, *leaving such, they should all die before any of them should attain twenty-five*, if sons, and, if daughters, before they should attain such age, or be so married, then over. A. died without leaving issue, and it was not contended, that, *in the events which had happened*, the bequest over was void on any other ground than that of the remoteness of the objects of the ulterior bequest, who were a class of persons possibly unborn at the death of the testator, and whose shares did not vest until the age of twenty-five. See also *Crompe* v. *Barrow*, 4 Ves. 681; *Cambridge* v. *Rous*, 8 Ves. 12.

Effect of possession only being too remote.

The circumstance of the *possession* being postponed beyond the limits prescribed for the *vesting* of estates, does not affect the validity of the gift, the only effect of the application of the doctrine in question being to accelerate the possession. Thus, where lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and amongst all and every the issue, child, and children of B. as should be living at the time of the decease of the

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(*a*) It is certainly rather singular that the Courts originally did not, in support of the limitation over, in cases of this nature, supply the words necessary to extend it to the event of there being no son at all, which (though *now* precluded by decision) might seem to have been authorized by those cases in which it has been held, that, where an estate is devised over in the event of the prior devisee, a supposed infant *en ventre sa mere*, dying without issue, or dying under the age of twenty-one years, the devise over will not be defeated by the fact of the object of the prior devise never having come into existence. *Jones* v. *Westcomb*, Pre. Ch. 316; *Andrews* v. *Fulham*, 2 Str. 1092; *Gulliver* v. *Wicket*, 1 Wils. 105; *Statham* v. *Bell*, Cowp. 40; *Fonnereau* v. *Fonnereau*, 3 Atk. 313; *Meadows* v. *Parry*, 1 Ves. & Bea. 124. By the same kind of implication, a bequest over, in case of a person having *but one* child, has been extended to the event of her having *no* child. *Murray* v. *Jones*, 2 Ves. & Bea. 313.

survivor of A. and B., to be divided share and share alike, *when and as they should respectively attain the age of twenty-four years*, and to their respective heirs, &c.; and if only one, then the whole to such only or surviving child, in fee, *upon attaining the said age*. It was contended, that the gift to children was too remote; but the Court of Common Pleas certified that the children living at the death of the survivor took "equitable estates in fee." *Farmer* v. *Francis*, 9 Moore, 310, S. C.; 3 Bing. 151; see also *Murray* v. *Addenbrook*, 4 Russ. 407. RULE AGAINST PERPETUITIES.

It remains to notice those cases in which a gift to unborn persons is void for remoteness, on account of the possibility of their not coming into existence within a life in being and twenty-one years afterwards; as where property is given to the children of an unborn person, which, if unrestrained by the context, is necessarily bad on this ground. A gift to the children of a living person cannot (unless the vesting is postponed beyond majority), transgress the rule, because such children necessarily come into existence during the life of the parent; hence, a gift by a testator to the children of his own children is valid, because his own children must be born in his lifetime, and therefore it is in effect, though not in terms, a gift to the children of persons in *esse;* while, on the other hand, a gift to the grandchildren of any other person, not restrained to the progeny of such children of that person as shall be born in the lifetime of the testator or of some other existing person, will be void. Gifts to the children of unborn persons void, unless restrained.

Testators frequently attempt to give property to unborn persons for life, with remainder to their issue. Such limitations are clearly bad, so far, at least, as respects the issue of the unborn persons; but there seems to be no reason, upon principle, for invalidating the gift to the legatees for life; for, as the testator might have given absolute interests to such persons, why may he not give partial interests to the same persons? since the remoteness consists not in the nature of the interest attempted to be given, but in the nature of the objects, namely, the issue of unborn persons, which, not necessarily coming into existence within a life in being and twenty-one years, are clearly too remote. Thus, if a testator devise lands to his son A. for life, with remainder to the children of A. for life, with remainder to the children of such children in fee, the last limitation would unquestionably be void; but it is conceived that the prior devises to the testator's son and his children would be valid, and the reversion in fee subject to those devises, and that only would descend to the testator's heir-at-law, as real estate undisposed of. So, if personal estate were bequeathed in a similar manner, the gifts to A. and his children successively for life would be good, and the ulterior interest, and that only, would devolve to the next of kin. Whether property can be given to unborn persons for life.

The case of *Cotton* v. *Heath*, 1 Roll. Ab. 612, pl. 3, seems to be a direct authority for this doctrine. A testator bequeathed a term for years to his wife for eighteen years, and then to B. his eldest son for life, and then to the eldest issue male of the son *for life*. Although B. had no issue Devise to unborn person for life held to be valid.

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male at the time of the devise and of the death of the testator, it was said, that, *if he had issue male before his (the son's) death, such issue should take by way of executory devise.*

Bequest to unborn persons for life held to be void.

A different rule, however, seems to have prevailed in the recent case of *Hayes* v. *Hayes*, 4 Russ. 311, where a testatrix bequeathed to her seven children a life-interest in 5000*l.* 3*l. per cent.* annuities, with benefit of survivorship, and declared, that, after the decease of the whole, then that their children should succeed severally to the annuity of their deceased parent, and after the decease of her seven children's children, to her own lawful heirs. Sir *J. Leach*, M. R., held that all the bequests posterior to the life-interest of the seven children were void. His Honour observed —" The true effect of this will is a limitation to the seven children for life, with remainder to their children, whether born or unborn at the death of the testatrix, for their lives, with a contingent remainder over to persons who shall answer a particular description at the death of the surviving grandchild. This is plainly too remote. You cannot limit to an unborn person for life, unless the remainder vests in interest at the same time. The gift to the children of the children is therefore void, and the seven children who take life-interests under the will, being the next of kin, are entitled to the remainder, as undisposed of."

Remarks on *Hayes* v. *Hayes*.

This decision, in vacating the bequest to the children's children, as well as the ulterior gift, agrees with the position advanced by the learned Judge who pronounced it, in the previous case of *Lord Deerhurst* v. *Duke of St. Albans*, 5 Madd. 278 (*a*); but is clearly inconsistent with the case of *Cotton* v. *Heath*, already cited, and contradicts the generally received opinions on the subject, including that of Mr. *Fearne*, who, in his well known Essay, treats the validity of a gift for life to an unborn person as a point rather to be taken for granted than discussed, (see Cont. Rem. 503); and of Lord *Alvanley*, who in *Routledge* v. *Dorril*, 2 Ves. jun. 366, observed—" A question might arise, *how far an unborn child is to be made tenant for life;* but it is established upon good principles in precedent certainly, *that that may be.* The doubt was, whether it was not tying up the estate beyond lives in being and twenty-one years afterwards, but that is not so *where the absolute interest is disposed of and vested*, though part is given for life, for that person, with the person having the absolute interest, may dispose of the estate. It is not inalienable." Indeed, the doctrine here contended for is impliedly admitted by the present Master of the Rolls himself, in his observation in *Hayes* v. *Hayes*, that you cannot limit to an unborn person, unless *the remainder vests in interest at the same time;* so that all are agreed

Opinions of Mr. *Fearne* and Lord *Alvanley* in favour of the validity of such a gift.

(*a*) But, as in this instance the unborn person took an absolute interest by the rules of construction, the point did not arise.

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on the general principle, and the only question is, as to the propriety of its non-application to that case. It is certainly difficult to discover why the gift of life interests to unborn persons should be vacated, because the testator has attempted to limit over the ulterior interest to unascertained objects. The excessive suspension of the vesting is effectually prevented by vacating such contingent ulterior gift, by which means the interest comprised in it would, immediately on the testator's decease, devolve to the next of kin, the effect being precisely the same as if the testator had (as in *Cotton* v. *Heath*) stopped with the bequest for life.

Effect of a precedent life interest in restraining gifts to grandchildren, &c.

Although a limitation to the children of an unborn person, which is preceded by a life interest to such unborn person, is void, there being nothing to confine the ulterior gift to objects who come in *esse* during a life in being; yet, if the precedent life interest were given to a person in *esse*, the ulterior gift would be valid, because, by the established rules of construction, it would comprehend only the objects living at the testator's death, and subsequently coming in *esse* during the life of the tenant for life, and he being a person in existence at the death of the testator, the gift in question is necessarily restrained within due limits. Thus, if real or personal estate were devised or bequeathed to, or in trust for, A. for life, and after his decease to be divided among his grandchildren, their heirs, executors, or administrators, such of the grandchildren as were living at the death of the testator, and those who afterwards were born during the life of A., would be entitled, to the exclusion of grandchildren subsequently coming into existence; (*vide post*, sect. xi. pl. 6); and consequently the gift to the grandchildren would be valid. But if no object should happen to come into existence previously to the determination of the prior life interest, *i. e.* if A. should die leaving children, but without having had any grandchild, since the effect of this circumstance would be to let in the whole range of grandchildren (if any) subsequently born, (*vide post*, sect. xi. pl. 6), (as it necessarily does from the absence of any data or principle for drawing an intermediate line), the gift would be void for remoteness.

Distinction as to remainders.

The rule just laid down is equally applicable to real and personal estate, except that if the devise to the grandchildren were a legal remainder, and at the death of A. there was no object capable of taking, then the limitation to such grandchildren would fail under the rule before noticed, requiring that a contingent remainder should vest at the instant of the determination of the particular estate on which it is dependent. In this instance, therefore, the same result is arrived at through different means.

Immediate gift, how far dependent for its validity on the event.

Where a gift of real and personal estate to grandchildren is not preceded by any life estate, it would be valid or not, according to the event of there being, or not being, an object living at the death of the testator, since upon this fact depends the alternative whether the gift is confined

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to objects then living, or includes all after-born grandchildren. Thus, if lands were devised to the grandchildren of A. in fee, and A. had a grandchild living at the testator's decease, such grandchild would take the whole, to the exclusion of after-born grandchildren; but, if there was no grandchild living at the testator's decease, it would extend to the whole line of after-born grandchildren. In the former case therefore it would, and in the latter it would not, be valid. (*Vide post*, sect. xi. pl. 6).

Effect of the words "to be born," &c.

But if the gift were to grandchildren "*to be born*," or "*to be begotten*," these additional words would have the effect of letting in after-born objects, even though there was a grandchild living at the death of the testator; and therefore, independently of that event, the gift would be too remote. *Mogg* v. *Mogg*, 1 Mer. 654.

Clause empowering trustees to protract the absolute ownership, void.

As the law does not permit to be done indirectly what cannot be done directly, the rule which forbids the limitation of real or personal estate to an unborn person for life, with remainder (*a*) to his issue, equally invalidates a clause in a settlement or will, empowering trustees, on the birth of tenants in tail, to revoke the uses and limit estates for life to such objects, who could not, by the rule under discussion, have been made tenants for life. *Duke of Marlborough* v. *Earl Godolphin*, 1 Eden, 404. The author of this futile expedient to evade the rule against perpetuities, was the celebrated John Churchill, the first Duke of Marlborough, anxious, it should seem, to transmit to his posterity (in addition to what the public generosity or gratitude had inalienably fixed in his descendants) an estate that should be no less enduring than the fame which he had won on the fields of Ramilies and Blenheim: but this great soldier, and perhaps still greater statesman, proved to be an unequal match for the sturdy rule of law.

Appointee must be competent to have taken immediately from the donor of the power.

And here it may be observed, that, in the case of appointments, testamentary or otherwise, in pursuance of powers of selection or distribution among defined classes of objects, the appointees must be persons competent to have taken immediately under the deed or will creating the power, as they are *in* under that deed. *Crompe* v. *Barrow*, 4 Ves. 681; *Robinson* v. *Hardcastle*, 2 D. & E. 240, 380, 781. Attention is often called to this doctrine in practice, for it frequently occurs that a power having been reserved by a settlement to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee (*b*) wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot he done; for, as the grandchildren of the marrying persons could not have been made objects of gift imme-

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(*a*) It is almost impossible, in stating limitations of personalty, to avoid using this expression, though strictly applicable only to real estate.

(*b*) *Vide ante*, Vol. 9, p. 138.

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diately under the limitations of the settlement, since they do not (as in the instance of children) necessarily come in *esse* during the lives of any of the parties then in being, they cannot take under the appointment founded on such settlement. *Bristowe* v. *Ward*, 2 Ves. jun. 336; *Crompe* v. *Barrow*, 4 Id. 681; see, also, *Robinson* v. *Hardcastle*, 2 D. & E. 241, 380, 781. In order to bring the appointment within the prescribed limits, it must be confined to such issue as shall be born in the lifetime of the marrying parties, or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of *Cadell* v. *Palmer* now allows us to say) of twenty-one years afterwards, unless the vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be postponed beyond the decease of the surviving parent, and the attainment of majority.

Effect of power and appointment, or one of them, embracing too wide a range of objects.

Where a power authorizes an appointment to issue only who are born within the prescribed limit, an appointment to a more extensive range of issue would be good *pro tanto*, though made to them as a class; for, as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory as to the shares expressed to be appointed to them. So, in the converse case, *viz.* that of the power embracing issue generally, and the appointment being confined to issue within the line, there can be no doubt (assuming that the power authorizes an exclusive appointment to such objects) that the appointment would be good. But, if the power and appointment *both* embrace too wide a range of objects (the appointment being made to them as a class), the appointment will be void *in toto*; as well as to members of the class who are within, as to those who are not within the line. *Routledge* v. *Dorril*, 2 Ves. jun. 357.

Construction not strained in order to bring a gift within legal limits.

It is clear, that, in order to render a gift to a class of persons valid, the class will not be narrowed to a more limited range of objects than the gift, according to the general rules of construction, would comprise; for, though it is highly probable, in such cases, that the testator, if asked, would have preferred to cut down his bequest, in order to bring it within valid limits; yet, as he has intimated no such intention, a Judge is not warranted in acting upon such an hypothesis. Thus, where a testatrix by her will bequeathed certain stock to her children respectively for life, and, after their decease, to their children; and, by a codicil, directed that her grandchildren's shares should be settled on them for their lives, and afterwards to revert to their children lawfully begotten. The testatrix had grandchildren born in her lifetime; and it was contended that the bequest might be confined to them, as the testatrix had spoken of grandchildren generally, and had in another part of her will made a bequest in favour of a grandchild living at her death; but, Sir *J. Leach*, M. R., held, that, as the grandchildren would include every

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child which the testatrix's children might at any time thereafter have, the limitation to the children of such grandchildren was void. *His Honour treated the codicil as a nullity, holding the bequest to take effect according to the will, as originally framed. Arnold* v. *Congreve*, 1 Russ. & Mylne, 209.

Case of *Mogg* v. *Mogg*.

It must be confessed, however, that the doctrine which teaches that the rules of construction are to be unsparingly applied, without regard to their effect in rendering devises valid or invalid, has not invariably been adhered to. An instance of its abandonment occurs in the case of *Mogg* v. *Mogg*, 1 Mer. 654, where real estate was devised to A. and B. in trust to pay the rents to the children, begotten and to be begotten, of Sarah Mogg, during his, her, and their life and lives; and after the decease of such children, the testator devised the estate to the lawful issue of such child or children, and his, her, or their heirs, as tenants in common. It was contended, that, as the estate *pur autre vie* included all the children living at *or born after* the death of the testator, the devise to their issue as purchasers was void *in toto*, as embracing all the issue coming into existence during that estate; and such, by the general rule, would clearly have been its construction. The Court of King's Bench, however, on a case from Chancery, certified that the issue of such of Mrs. Mogg's children *as were born prior to the testator's decease*, took an interest as tenants in common in fee-simple, expectant upon the determination of the estate to the trustees; but that none of the issue of such of Mrs. Mogg's children as were born after the testator's decease took any interest. This certificate was afterwards confirmed by Sir *William Grant*, M. R.

Observations on the case.

By what authorities or process of reasoning the Court felt itself warranted to draw this line between children living at the testator's death and those born afterwards, we are not informed, the certificate being, according to the present practice, silent as to the grounds of the opinion expressed in it. The construction certainly was not authorized by the *cy-pres* doctrine; for, though this doctrine takes great liberty in moulding a testator's disposition, in order to bring it within legal limits, yet, it proceeds upon a principle which does not apply to such a case as *Mogg* v. *Mogg*, as will appear from the following statement, and examples of it.

Doctrine of *cy-pres*, or approximation.

The doctrine of *cy-pres*, or approximation as it is called, is that which obtains in certain cases where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail. As such limitations are clearly incapable of taking effect, the remainder to the issue being absolutely void, the doctrine, in order to prevent the total frustration of the intention in favour of the issue, gives to the parent the estate tail, which was designed for the issue; under which estate tail, unless barred by some act on the part of the parent, the lands will descend to the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue is consi-

RULE AGAINST PERPETUITIES.

Unborn tenant for life made tenant in tail under the *cy pres* doctrine.

dered as paramount to that which regulates the manner of their taking, and the latter is therefore sacrificed. The first unexceptionable (*a*) authority for the doctrine is the case of *Nicholl* v. *Nicholl*, 2 Bl. 1759, where the devise was "to the second son of W. Nicholl *(who at the death of the testator had no son) for his life*, and after his death, or in case he should inherit the paternal estate by the death of his brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, in tail male, remainder over." The Court of Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son by executory devise; and, in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate.

So, in *Robinson* v. *Hardcastle*, 2 D. & E. 241, 380, 781, where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and, in default, over. A. by will appointed to his son for life, with remainder to trustees, to preserve contingent remainders, with remainder to the first and other sons of such son successively, in tail male, with remainder to his daughters as tenants in common in tail. Mr. Justice *Buller* expressed an opinion that the son, by the application of the *cy-pres* doctrine, took an estate tail; but the Court was not called upon to decide the point. See also *Hopkins* v. *Hopkins*, Cas. Temp. Talb. 44; 1 Atk. 580; Co. Litt. 271. b.; Butl. n., S. C.

Case of *Pitt* v. *Jackson*.

The case which has carried this doctrine the greatest length is *Pitt* v. *Jackson*, 2 B. C. C. 51, S. C. cited 2 Ves. Jun. 349; which was as fol-

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(*a*) The case of *Humberston* v. *Humberston*, 1 P. W. 332, has usually been considered as a leading authority for the doctrine. A testator directed trustees to convey lands to M. H. for life, and then to his first son for life, and so to the first son of that first son for life, &c. This trust was executed by a strict settlement, making the sons born before the death of the testator, tenants for life, and those born afterwards, tenants in tail. The trust, however, being executory, the Court was authorized to mould the limitations so as to bring them within the established limits, independently of the doctrine in question. The case of *Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1626 (S. C. in Dom. Proc. 3 B. C. C. Toml. ed. 269), cited by Mr. Butler, Butl. Fea. C. R. 207, n., is also distinguishable, (though the doctrine underwent discussion), as there was an express devise in tail to the unborn son, the only question being whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good.

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lows:—On the marriage of Pinckney Wilkinson, certain monies to be paid by him were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage in tail, subject to such powers, limitations, and provisoes as P. W. by deed or will should appoint, with remainders over. By will he bequeathed certain sums of money in trust to be laid out in real estate, to be conveyed in trust for his daughter Mary, during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter*, with remainders over. Sir *Lloyd Kenyon*, M. R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was, to effectuate the testator's general intention, to be considered to vest in her an estate tail.

Remarks on the case of *Pitt* v. *Jackson*.

This case went beyond the preceding decisions, because the manner in which the children were intended to have taken the estate under the appointment differed more considerably from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In those cases, the first and other sons were to take successively; *here*, all the children, female as well as male, were to take concurrently. Probably, the authority of *Pitt* v. *Jackson* is not to be implicitly relied on; even the eminent Judge who decided it, on a subsequent occasion (1 East, 451), admitted that the case went to the outside of the rules of construction: adding, however, that still he did not think it was wrong. Lord *Eldon*, in quoting this observation (7 Ves. 390), intimated that it was not proper to go one step farther; for those cases, in order to serve the general intent and the particular intent, destroyed both.

Limitations imposed on the *cy-pres* doctrine.

It has since been decided, in relation to the doctrine in question, 1*st*, That it does not apply to limitations of personal estate. *Routledge* v. *Dorril*, 2 Ves. jun. 365. 2*ndly*, That it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations. *Somerville* v. *Lethbridge*, 6 D. & E. 213; *Seaward* v. *Willock*, 5 East, 198; *Beard* v. *Westcott*, 5 Taunt. 393; 5 Barn. & Ald. 801; 1 Turn. 25, S. C.; and 3*rdly*, That the doctrine is not applicable where the limitation to the children of the unborn person gives them an estate in fee-simple. The last point was decided in the case of *Bristowe* v. *Warde*, 2 Ves. jun. 136, where money directed to be laid out in land was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband, in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease among their children, as they should appoint. It was held to be real estate, and that the husband's appointment, which would have the effect of vesting absolute interests in the children

of the children, in default of appointment by those children, was void as to them, and could not, Lord *Loughborough* was of opinion, be executed *cy-pres* (*a*).

RULE AGAINST PERPETUITIES.

3. *Restraint on the Accumulation of Income.*

RESTRAINT ON ACCUMULATION.

Accumulation of income, how restrained.

Restraint on the accumulation of the rents and profits of lands was unknown to the common law, except so far as it was involved in the doctrine which prohibited the giving an estate for life to an unborn person, with remainder to his issue. The rule against perpetuities necessarily prevented accumulation from being carried beyond its limits; though, in the early discussions of the rule, no allusion is made to it, probably because for a long period trusts directing the accretion of income were of rare occurrence, so that little or no inconvenience was experienced from the allowance of so wide a range of accumulation. The late Mr Thellusson was the first who, by the capricious and extensive exercise of the power which this rule placed in his hands, shewed the necessity of further restraint. The validity of this gentleman's will, which suspended the absolute ownership, and postponed the usufructuary enjoyment of the bulk of his estate until the expiration of nine lives in being at the time of the testator's death, was established, after many hard struggles, occasioned rather by the immense value of the property implicated (computed to amount, with the accumulations, to upwards of 18,000,000*l.*), than by any real difficulty in the principle; for, by confining the restriction to existing lives, the testator had, with a prudent foresight worthy of a better purpose, escaped the question since agitated respecting the allowance of an absolute term in addition to a life (*b*).

Stat. 40 Geo. 3, c. 98.

This case was soon succeeded by the passing of the stat. 40 Geo. 3, c. 98, by which, after reciting that it was "expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions" thereinafter contained, it is enacted, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, *will, codicil, or otherwise soever*, settle or dispose of any *real or personal property*, so and in such manner that the *rents, issues, profits, or produce* thereof, shall be wholly or partially *accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers*, OR *the term of twenty-one years from the death of any such grantor, settler, devisor, or testator*, OR *during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mere, at the time of the death of such grantor, devi-*

No person to settle or dispose of property so as to accumulate the income longer than for the life of the settlor and twenty-one years, or certain minorities.

(*a*) According to the report in Brown, they were tenants for life only; but this seems to be inaccurate.

(*b*) An act has just passed for the regulation of the Thellusson property.

RESTRAINT ON ACCUMULATION.

sor, or testator, OR *during the minority or respective minorities only of any person or persons,* who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, *would* for the time being, if of full age, *be entitled* unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Sect. 2 provides, "That nothing in this act contained shall extend to any provision *for payment of debts* of any grantor, settler, or devisor, or other person or persons, or to any provision for *raising portions for any child or children* of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction *touching the produce of timber or wood,* upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed." Sect. 3 declares that the act shall not extend to dispositions of *heritable property* in Scotland.

Act not to extend to provisions for payment of debts, or for raising portions for children in certain cases,

—nor to directions touching the produce of timber,

—nor to heritable property in Scotland.

Whether the act allows accumulation for all the specified periods cumulatively.

Mr. Preston (2 Treatise on Abstracts, p. 181) has advanced an opinion, that a testator or settlor may take each of the periods of accumulation mentioned in the statute; for instance, that he might accumulate income for a term of twenty-one years, and also for the minority of any person entitled under the limitations. The language of the statute, however, is disjunctive, conferring, therefore, it should seem, the option of selecting one only of the designated periods; and such we may collect from the judgment in the case of *Griffiths* v. *Vere,* 9 Ves. 136, to be the opinion of Lord *Eldon,* who there takes some pains to shew, that, under certain circumstances, the combined effect of an express trust for accumulation for twenty-one years, and of the rule of law which accumulates the income of a minor, might be to protract accumulation for forty years, thereby evidently indicating that his lordship did not consider the statute directly to authorize accumulation to that extent. Indeed, the point could scarcely arise in regard to a will, because the minority of a person in *esse* at the death of the testator, would necessarily be comprised in the term of twenty-one years, expressly given by the statute; and the clause allowing accumulation during the minority of any of the persons entitled under the uses or trusts, has been decided *not to authorize a positive trust for accumulation extending over the minority of an unborn person, to whom, at majority, the accumulated fund, and the principal from which it arose, are given.* Thus, in the case of *Haley* v. *Bannister,* 4 Madd. 275, the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated, until one of the children of

Construction of clause respecting minority of persons entitled under the limitations.

his daughter, born or *to be born*, should attain the age of twenty-one, when the whole was to be transferred to such child, and any other child or children who might be then living; the will contained a residuary clause. Sir *J. Leach*, V.C., said—"The statute prevents an accumulation of interest during the minority of an unborn child; but, as to the principal, the law remains as before the statute. The excess of accumulation, prohibited by the statute, would form part of the residue." This decision reduces the clause of the act, which allows accumulation during the minority of any person, who, if of age, would be entitled to the income, to a mere saving or reservation of the rule of law which so disposes of the income of minors, or rather of their surplus income, after providing for maintenance. It limits the term of accumulation authorized by the act to twenty-one years from the testator's decease, or the minority of a person then in *esse*, which, in fact, is included in the former, since every person born before the death of the testator must necessarily attain majority before the expiration of twenty-one years, computed from that period. The decision, therefore, seems to place in some peril the accumulating trusts ordinarily introduced into provisions for the maintenance of minors, being persons unborn at the testator's decease, which direct the unapplied surplus income from time to time to be added to the principal. Such trusts, however, are distinguishable from the bequest in *Haley* v. *Bannister* in this, that they extend only to the unapplied surplus and not to the entire income, and therefore approach more closely to the principle of the rule of law which accumulates the income of minors after providing for maintenance, though they differ from that rule in regard to the ultimate destination of the accumulated fund which the law gives to the minor himself, but which the express trust commonly annexes to the principal fund; though even this difference is considerably narrowed where the trustees (as they frequently do, and always ought to) possess a power of applying the accumulated fund at any subsequent period of minority,* which clause would certainly afford a strong argument for taking the trusts in question out of the vacating principle of the case of *Haley* v. *Bannister;* indeed, considering the extreme inconvenience of holding them to be invalid, it is probable that the Courts would not come to that conclusion unless they felt themselves to be irresistibly impelled to it by authority. Where the minor, whose income is accumulated, is the child of a prior legatee for life of the same property, (which is a common case), the point to which the preceding observations have been directed does not arise, as the accumulation is then authorized by the proviso applicable to children's portions.

RESTRAINT ON ACCUMULATION.

As to accumulation directed by maintenance clauses.

An important and well-settled doctrine in the construction of the sta- Excessive accu-

* *Vide ante*, Vol. 9, p. 129.

RESTRAINT ON ACCUMULATION.

mulating trust good *pro tanto*.

tute is, that a trust for accumulation, reaching beyond the allowed period is good *pro tanto*. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B. *(who had no children at the death of the testator)*, and, on their attaining twenty-one, the whole to be divided among them; Sir *W. Grant*, M. R., held, that the accumulation was good for twenty-one years from the death of the testator. *Longdon* v. *Simson*, 12 Ves. 295; see also *Palmer* v. *Holford*, 4 Russ. 403.

The same point had been previously decided in the case of *Griffiths* v. *Vere*, 9 Ves. 127, which also elicited from Lord *Eldon* some general observations respecting the destination of the income which is released from accumulation by the act. The testatrix bequeathed the residue of her property to E. M. G. and M. W. during their joint lives, in equal proportions, and, after the decease of either, to the survivor; but she declared that so much of the interest as should accrue to E. M. G. *during the life of* J. G., her husband, *should be accumulated* with the capital, and, upon his decease, the capital and accumulation paid to E. M. G.; and if she should then be dead, to another person: Sir *W. Grant*, M. R. dismissed a petition of E. M. G. and her husband, claiming the benefit of the will, as if the clause of accumulation, which was alleged to be void, had not been inserted; and this dismissal was confirmed by Lord *Eldon*, on the ground that a trust for accumulation during a life *is good for the period of twenty-one years of that life*. His Lordship expressed some doubts whether, if the accumulation were void, the gift to the wife would operate as a bequest *in præsenti;* the whole must, he said, be taken together. On the general question as to the *destination* of income, the accumulation of which was rendered void by the act, his Lordship observed, that "the object of those who introduced the statute, and the idea of all, was, that, in general, if not in all cases, those rents and profits would have gone, not to persons claiming by disposition, but by the effect of the act, striking out of the will the direction for accumulation to those entitled by intestacy; for, if literally pursued, the testator might give his estate to a person, not to take till the expiration of twenty-one years after a life in being; and if he said nothing about accumulation, the rents and profits would be undisposed of: if he directed what the act authorizes him to direct, that, for the first twenty-one years after his death there should be accumulation, at the end of that time there might be a very long period during which the rents and profits would go to no one by the disposition; but, in the case of real estate, would belong to the heir, and in case of personal estate, unless there was an express disposition of what was not before disposed of, to the next of kin. The sort of case now before me was not, I believe, much in the contemplation of the legislature. It is material to attend to every word, of the act: for, the lan-

Destination of income, the accumulation of which is void under the statute.

RESTRAINT ON ACCUMULATION.

guage is not very similar to any other act with either enabling or restraining clauses. The phrase 'partial accumulation' is rather expressive of the effect, than of direction; but, considering the subsequent part, it must be construed what shall be directed to be accumulated. If the act stopped at the declaration, that it shall be null and void, the estate, in the meantime, would be considered as not given, unless falling into the residuary devise; and, therefore, the rents and profits undisposed of must have gone to the heir. But the question is, whether the following words are not so explanatory as the former, as to shew in what sense the legislature used the words declaring that it should be null and void; and whether, taking the whole clause together, it was not meant only as far as by the subsequent words 'it is directed to be considered.' The words 'so long,' admit two constructions: one, so long as the same, by the effect of the direction in the will, shall be capable of being accumulated beyond twenty-one years from the death; the other, so long as the same shall be directed to be accumulated contrary to the provisions of the act: the accumulation being understood to be contrary to the act, if directed by the will for more than twenty-one years."

Accumulation arising from nature of gift, and not from express direction.

No reported case has occurred illustrating the application of the statute to gifts, in which the accumulation has resulted, not from an express direction to accumulate, but from the vesting, both of the *corpus* and the income, being postponed until a future period, exceeding twenty-one years in duration; as, if a testator should bequeath the residue of his personal estate to the first son of A. born after his (the testator's) decease, who should attain the age of twenty-one years. This gift would, when it takes effect, according to the established construction of residuary bequests, carry the income accruing before the period of vesting; involving, therefore, an implied trust for accumulation, inevitably extending beyond the statutory term. In such a case, the income accruing after twenty-one years from the testator's decease would unquestionably go to the next of kin. If any specific subject of personal estate were bequeathed in a similar manner, the effect might be different, for the intermediate profits would not accumulate for the specific legatee, but would belong to the residuary legatee, if there was one, (see *Haley* v. *Bannister*, 4 Madd. 275, *ante*, p. 66), and to the next of kin if there was not. So, if the subject were real estate, the heir-at-law, or the residuary devisee, as the case might be, would be entitled to the immediate income, as an interest in real estate not included in the particular devise. In the two latter instances, there being no accumulation, of course the statute would not be called into operation. But it is to be observed, that, where the entire real and personal estate of a testator are blended in one gift, the vesting of which is postponed to a future period, the immediate income arising as well from the real as from the personal estate, follows the destination of the corpus of the property, according to the rule applicable to residuary bequests; the presumption being,

Destination of the immediate income in certain cases of future specific and residuary gifts.

RESTRAINT ON ACCUMULATION.

that the testator had the same intention as to *both; Gibson* v. *Lord Montfort,* 1 Ves. sen. 485; *Chambers* v. *Brailsford,* 18 Ves. 368; *Glanvill* v. *Glanvill,* 2 Mer. 38; *Genery* v. *Fitzgerald,* Jac. 468; so that the case is governed by the rule first laid down. After the expiration of twenty-one years from the testator's decease, until the vesting, therefore, the income of the real estate would go to the heir, and the income of the personalty to the next of kin. And the same principle would regulate the destination of the accumulated fund itself, if the contingent gift, which was to carry it, failed in event; *i. e.* that portion of the fund which resulted from real estate would belong to the heir, and that portion of it which proceeded from personalty to the next of kin. *Chambers* v. *Brailsford,* 18 Ves. 368. See also *Roberts* v. *Walker,* 1 Russ. & Mylne, 752.

It is to be observed that the statute does not allow of accumulation for twenty-one years whenever commencing, but requires that it should be comprised within the term of twenty-one years, computed from the testator's death. Thus, if an accumulating trust were made to arise on a contingency, which did not happen until nineteen years after the testator's decease, the trust would be determined by the statute at the expiration of the twenty-one years, though it had run only two years; and by parity of reason, if the contingency did not occur until twenty-one years after the testator's decease, the trust would be void *in toto.*

As to the heir taking by devise.

In addition to the restrictions on the testamentary power already noticed, there existed, until very recently, the restraint arising from the doctrine which precluded a testator from vesting in his heir an estate in fee simple by purchase. By the effect of this doctrine, if a testator devised lands of inheritance to his heir apparent and his heirs, the devise was inoperative, and the heir took the fee by descent as his elder or paramount title; but the law on this subject has been completely altered by the late act of 3 & 4 W. 4, c. 106, s. 3, stated *post,* 219, which declares, that, where land is devised to the heir, he shall be considered to have acquired it as devisee and not by descent. This enactment will not have the effect of varying any of the testamentary forms in use; its merit is, that it gets rid of a doctrine which has given rise to much litigation, and still presented some unadjudicated points.

FREEHOLDS. EXECUTION AND ATTESTATION.

VI. EXECUTION AND ATTESTATION.

1. *As to Freeholds of Inheritance.*

29 Car. 2, c. 3. Wills of lands

A will devising freehold lands of inheritance must be executed in the manner prescribed by the 5th section of the statute of frauds (29 Car. 2, c. 3), which enacts, that, "all devises and bequests of any lands or tene-

ments, devisable either by force of the statute of wills, or by that statute (statute of frauds), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, *and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor, by three or more credible witnesses,* or else they shall be utterly void and of none effect."

FREEHOLDS. EXECUTION AND ATTESTATION.

to be signed and attested by three witnesses.

Examining the words in their order, the first question is, what is a "signing" by the testator? The statute does not require that the signature shall be the personal act of the testator, but allows it to be made by any "other person in his presence, and by his express direction." This may be convenient where a testator is unable to write, but in such cases he usually affixes his mark. It has never been expressly decided that a mark is a sufficient signing, but the point is not to be doubted. In the case of *Right* v. *Price*, Doug. 241, no objection was made to a will devising freehold estates (and whose validity was disputed on another ground) on account of its bearing only the mark of the testator; and Lord *Eldon* more recently (*Wright* v. *Wakeford*, 17 Ves. 458) assumed, in the discussion of another point, the sufficiency of a mark to satisfy the statute. At one time, it appears to have been thought that even sealing alone, without signing, would suffice; see *Lemayne* v. *Stanley*, 3 Lev. 1, but the contrary is now clear, not indeed by the effect of any positive decision, but by the unanimous opinion of every Judge who has referred to the point, from Lord Chief Baron *Parker* and his co-adjutors, in the case of *Smith* v. *Evans*, 1 Wils. 313, (though the learned Chief Baron, on another occasion, *Ellis* v. *Smith*, 1 Ves. jun. 12, erroneously supposed it to have been decided the other way), down to Lord *Eldon* in the case of *Wright* v. *Wakeford*, 17 Ves. 458; these learned Judges probably concurring in the conclusion drawn by Lord *Hardwicke* in the case of *Grayson* v. *Atkinson*, 2 Ves. sen. 458, that the statute, in requiring a will to be signed, meant some evidence to arise from the handwriting.

Mark, a sufficient signing.

One signature is of course sufficient, though the will be contained in several sheets of paper; and even where the *testimonium* at the end refers to the preceding sheets as subscribed by the testator, the fact of those sheets being omitted to be signed will not affect the validity of the will, as the testator evidently intended the signing of the last sheet, or the signing and sealing (if the testator has thought proper to affix a seal), to apply to the whole. *Winsor* v. *Pratt*, 5 Moore, 484; S. C. 2 Brod. & Bing. 650.

One signature sufficient.

It is immaterial in what part of the will the testator's name is written; and where the whole will is in the testator's handwriting, the name oc-

Local position of the signature immaterial.

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curring in the body, as the usual exordium—"I, A. B., do make," &c., has been decided to be a sufficient signing. *Lemayne* v. *Stanley*, 3 Lev. 1; Freem. 538; 1 Eq. Ca. Ab. 403, pl. 9, S. C.; *Cook* v. *Parsons*, Pre. Ch. 184; see also *Hilton* v. *King*, 3 Lev. 86; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Coles* v. *Trecothick*, 9 Ves. 249. But the signature, whatever be its local position, must have been made with the design of authenticating the instrument; for, it should seem, that, if the testator contemplates a further signature, which he never makes, the will will be considered as unsigned; *Right* v. *Price*, lessee of *Cator*, Dougl. 241; see also *Griffin* v. *Griffin*, 4 Ves. 197, n.; *Coles* v. *Trecothick*, 9 Ves. 249; *Walker* v. *Walker*, 1 Mer. 503; though it should be observed that in *Right* v. *Price* the point was not decided; and the reasoning seems only to apply where the intention of repeating the signature remained to the last unchanged, for a name originally written with such design might afterwards be adopted by a testator as the final signature; and such, it is probable, would be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing. Still, in practice, no one, in superintending the execution of a will, would think of dispensing with a formal signature, because the testator had himself written his name in the body.

What a sufficient publication.

It will be observed, that the testator is merely required by the statute to "sign;" but it was formerly considered, that, independently of this enactment, publication was necessary to complete the testamentary act. Lord *Hardwicke*, in particular, in the case of *Ross* v. *Ewer*, 3 Atk. 156, strenuously insisted on the necessity of publication. On the other hand, in the case of *Moodie* v. *Reid*, 7 Taunt. 361, Sir *V. Gibbs*, C. J., expressed a decided opinion that publication was not an essential part of a will, not being, as he conceived, necessary to devises by custom at common law, nor made so by the statutes of Henry the 8th and Charles the 2nd; and subsequent Judges have virtually adopted the latter opinion, having (as we shall presently see) decided that a will of freehold lands may be duly executed by a testator, without his uttering a syllable declaratory of the nature of the instrument.

Witnesses need not see the testator sign.

Another question was, whether the attesting witnesses ought to see the testator actually sign, or whether his acknowledgment of the signature was sufficient; and the rule long since established is, not only that an acknowledgment will suffice, but that it may be made before each witness separately, and need not take place in the simultaneous presence of all. This point, though doubted in some of the early cases, (*Cook* v. *Parsons*, Prec. Chan. 184, and *Dormer* v. *Thurland*, 2 P. W. 506), was decided by Sir *Joseph Jekyl*, in the case of *Smith* v. *Codron*, cit. 2 Ves. sen. 455, where A. signed and published a will in the presence of two persons, who attested it in his presence; then, a third person was called

in, to whom the testator shewed his name, telling him that was his hand, and bidding him witness it, which the witness did in the testator's presence, who, two hours afterwards, told him that the paper he had subscribed was his will; this was held to be a good execution. Since this case, the doctrine has been confirmed in a series of decisions, reaching down to the present time. *Stonehouse* v. *Evelyn*, 3 P. W. 253; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Ellis* v. *Smith*, 1 Ves. jun. 11; *Addy* v. *Grix*, 8 Ves. 504; *Westbeech* v. *Kennedy*, 1 Ves. & B. 362; *Wright* v. *Wright*, 5 Moore & Payne, 316.

Witnesses may attest separately and at different times.

As it is sufficient for the testator to sign before some, and acknowledge the signature before the rest, of the witnesses, so, by necessary consequence, an acknowledgment before all will be equally effectual. Such were the circumstances in the case of *Ellis* v. *Smith*, 1 Ves. jun. 11, which was solemnly decided by Lord *Hardwicke*, with the assistance of Sir *John Strange*, M. R., Lord C. J. *Willes*, and Lord C. B. *Parker*. Lord *Hardwicke* considered the sufficiency of the testator's declaration to have been virtually decided by the cases establishing that the witnesses might attest at different times; for, if the testator signed three times, there were three executions, and none of them good.

The next question was, what constituted a sufficient acknowledgment before the witnesses. In the case of *Gryle* v. *Gryle*, 2 Atk. 176, Lord *Hardwicke* doubted whether it was enough for the testator to say before the witness—"This is my will," without a resealing, (for the instrument, in that case, had the unnecessary appendage of a seal), or unless the testator had declared it to be his handwriting; but the doubt appears to have vanished from the mind of the noble Judge in the case of *Ellis* v. *Smith*, 1 Ves. jun. 11, where the point is stated in general terms to be, whether a testator's declaration before three witnesses, that it is his will, was equivalent to signing; and the conclusion, therefore, of the learned Judges, in favour of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration.

Several recent decisions have placed the point beyond all doubt, by going much farther; these cases having decided, that, where a testator, who has previously signed his will, merely requests the witnesses to subscribe the memorandum of attestation, though they neither see his signature nor are made acquainted with the nature of the instrument they attest, yet, the will is duly executed according to the statute. *British Museum* v. *White*, 3 M. & P. 689; S. C. 6 Bing. 310; *Wright* v. *Wright*, 5 M. & P. 316; S. C. 7 Bing. 457; *Johnson* v. *Johnson*, 1 C. & M. 140. In the first of these cases, Lord Chief Justice *Tindal* said—"When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the

Witnesses need not see the testator's signature, or know the nature of the instrument.

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testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his."

Attestation by witnesses' mark sufficient.

The next requisition is, that the will be "attested and subscribed" by three witnesses. A mark has been decided to be a sufficient subscription; *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, Ib. 504; but it is never advisable where it can be avoided, and now that the art of writing is so common, seldom necessary, to employ marksmen as witnesses.

Memorandum of attestation need not record the fact of the testator's presence.

No particular form of words is essential to constitute an attestation. It is not requisite (though always proper) that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, but which fact of course must be clearly and distinctly proved by oral testimony, when the validity of the will is called in question, whether the memorandum of attestation records it or not. *Hands* v. *James*, Comyns, 531; *Croft* v. *Pawlett*, 2 Str. 1109; S. C. 8 Vin. Ab. 128, pl. 14; *Brice* v. *Smith*, Willes, 1; *Lord Rancliff* v. *Lady Parkins*, 6 Dow, 202. And even where the death of the witnesses prevents the obtaining actual proof, the fact in question would, it seems, though not recorded, generally be presumed. *Hands* v. *James*, *Crofts* v. *Pawlett*, *supra*.

Subscription by witnesses must be in the testator's presence.

It is to be observed, that the will must be subscribed by the witnesses in the *presence* of the testator. The design of the Legislature in making this requisition evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the Courts, in fixing the signification of the word "presence." To constitute it, in the first place it is essential that the testator should be capable of recognising the act which is being performed before him; for, if this power be wanting, his mere corporal presence will not avail. Thus, if a testator, after having signed and published his will, and, before the witnesses subscribe their names, falls into a state of insensibility, (whether permanent or temporary, would, of course, be immaterial), the attestation is insufficient. *Right* v. *Price*, Doug. 241.

"Presence" held to mean *within the view.*

And the testator ought not merely to possess the mental power of recognising, but be actually conscious of, the transaction in which the witnesses are engaged; for, if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room where it was done would not sustain it. See *Longford* v. *Eyre*, 1 P. W. 740. Nor, on the other hand, would the circumstance of the testator not being in the same room invalidate the attestation, if it took place *within his view*. Thus, in the case of *Sheers* v. *Glasscock*, 2 Salk. 688, S. C. cit. Carth. 81, where the testator, being in extreme illness, the witnesses, after he had signed the will, withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses

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subscribed the will. It was proved, that the testator might have seen, from his bed, the table in the gallery where the witnesses subscribed, through the lobby and the broken glass windows; and this was adjudged a good will to pass lands: for the statute required attesting in his presence to prevent obtruding another will in place of the true one; it was, therefore, enough if the testator *might* see, it was not necessary that he *should* actually see the signing; because, if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within view of the testator, he might have seen it, and that was enough. So, in *Davy* v. *Smith*, 3 Salk. 395, where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open, so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did see them subscribe; for it was possible that the testator might have seen them subscribe. And, in the preceding case, it was said, *per curiam*, that, if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence.

Testator and witnesses need not be in the same house.

It is not even necessary that the testator should be in the same house with the witnesses; for, in *Casson* v. *Dade*, 1 B. C. C. 99; S. C. Dick. 586, where a *feme coverte* having power to make a writing in the nature of a will, ordered such an instrument to be prepared, and went to her attorney's office to execute it; but, being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might have seen what passed. Lord *Thurlow* was of opinion that the will was well executed.

The mere contiguity of the respective places occupied by the testator and the witnesses, of course, will not avail, if the testator's view of the witnesses is necessarily obstructed. Thus, in *Eccleston* v. *Petty*, Carth. 79; S. C. Comb. 156, 1 Show. 89; Ca. T. Holt, 222; where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall, and that it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested.

Witnesses must be visible in tes-

And it is not enough, that, in *another* part of the same room, the testator might have perceived the witnesses, if, in his actual position, it was

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impracticable. And, therefore, in the case of *Doe* d. *Wright* v. *Manifold*, 1 Mau. & S. 294, where the testator was in bed in a room, from one part of which he might, by inclining his head into the passage, have seen the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord *Ellenborough* said—"In favour of attestation, it is presumed, that, if the testator might see, he did see; but I am afraid, that, if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that, where the devisor cannot by possibility see the act doing, that is out of his presence."

tator's actual position.

Where the evidence fails to shew in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table probable to have been used, would be material. *Winchelsea* v. *Wauchope*, 3 Russ. 444.

It is scarcely necessary to add, as a concluding remark on this subject, that the occasion of the absence of the witnesses, whether for the ease or at the express request of the testator, or any other cause, is quite immaterial. *Broderick* v. *Broderick*, 1 P. W. 239; *Machell* v. *Temple*, 2 Show. 288.

Witnesses must be credible.

The statute, it will be observed, requires the attestation of *credible* witnesses. It seems to be the better opinion, that the inquiry into credibility must be directed to the time of the attestation, and not to that of the witnesses' examination; the grounds of which doctrine were thus forcibly vindicated by Lord *Camden* in his judgment in the case of *Doe* d. *Hindson* v. *Kersey*, 4 Burn's Eccl. Law, 97.—"A will," said his Lordship, "is often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such cases is, whether the testator were in his senses when he made the will, *and consequently the time of the execution is the critical moment which required guard and protection.* What is the employment of the witnesses?—it is to attest, and to judge of the testator's sanity when they attest; and if he is not capable, they ought to refuse to attest. In some cases the witnesses are passive; here they are active, and, in truth, the principal parties to the transaction;—the testator is intrusted to their care." See also *Brograve* v. *Winder*, 2 Ves. jun. 636.

Credibility to be at the time of attesting.

Gifts to attesting witnesess void, by stat. 25 Geo. 2, c. 6.

Incompetency to attest the execution of a will may be created either by interest or crime. The disqualification of interest has been much narrowed by the stat. 25 Geo. 2, c. 6, which has made absolutely void every devise or bequest to attesting witnesses; but the act provides that a creditor, whose debt is charged on the real estate, shall be a good witness. As to this statute, the following points have been decided:—

Points decided on the statute.

1st. That it extends only to persons beneficially interested, and not to a devisee or executor in trust. *Anon.* 1 Mod. 107; *Lowe* v. *Jolliffe*, 1 Blackst.

365; *Holt* v. *Tyrrell*, 1 Barn. K. B. 12; *Battison* v. *Bromley*, 12 East, 250; *Phipps* v. *Pilcher*, 6 Taunt. 220, S. C. 1 Madd. 144. See also *Goss* v. *Tracey*, 1 P. W. 290; *Goodtitle* v. *Welford*, Doug. 139.— 2dly. That it does not apply to wills of personal estate; for, as such wills do not require an attestation, the ground for vacating the gift to the witness fails. *Brett* v. *Brett*, 3 Adams, 210; *Emanuel* v. *Constable*, 3 Russ. 436, which overrule *Lees* v. *Summersgill*, 17 Ves. 508. 3rdly. That the statute only applies where the witness takes a direct interest under the will, and not where his interest arises consequentially. Thus, where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, who would *jure uxoris* have derived an interest in the devised lands; it was held, that the devise was not within the statute, and consequently the attestation was insufficient. *Hatfield* v. *Thorp*, 5 Barn. & Ald. 589.

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Persons who are rendered infamous by conviction for crime, are of course incompetent witnesses. *Pendock* v. *Mackinder*, 4 Burn's Eccl. Law, 93; Willes, 665. But this ground of disqualification so seldom occurs among the class of persons from whom witnesses are, or at least ought to be selected, and is so fully discussed in the Treatises on Evidence, that the subject may be dismissed with the observation, that, in the choice of witnesses, it should not be considered enough that they are within the pale of legal competency, they ought to be persons whose character and station in society would give weight to their testimony in case the validity of the will were disputed, and which, let it be remembered, may be done on the allegation, not only of mere informality in the execution or attestation, but of mental incompetency; in which case the evidence of three respectable and intelligent witnesses to the will in favour of the testator's sanity (*a*) at the moment of its execution, will often outweigh the testimony of a host of witnesses speaking to occasional aberrations. See *Kemble* v. *Church*, 3 Hagg. 275. Another advantage in having witnesses of a considerable station in society, is the greater facility of proving their decease and handwriting.

Witnesses may be disqualified by crime.

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to any part has been held to apply to the whole, including as well what was long before written, as what had been recently added, though the antecedent part bore a different date from, and was complete in itself independently of, the latter. *Carleton* v. *Griffin*, 1 Burr. 549.

Attestation will apply to several clauses written at different times.

And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were

Also to several sheets, provided all were present.

(*a*) *Vide* Lord *Thurlow's* judgment in *Attorney-General* v. *Parnther*, 3 B. C. C. 442, and cases *passim* in the Ecclesiastical Reports of Drs. Phillimore, Addams, and Haggard.

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present when the act of attestation took place; and which presence it seems would be presumed, unless the contrary were distinctly proved; *Bond* v. *Seawell*, 3 Burr. 1775; as would also the fact of the attestation being intended to apply to the whole.

One attestation sufficient for a will and codicil.

The presumption would be somewhat less, of course, when the respective papers have each a distinct character independent of the other, as where one is a will and the other a codicil, or they consist of two separate codicils.

Attestation of codicil held not to apply to a will.

And it is clear, that, where a testator makes a will, which he causes to be attested by two witnesses, and afterwards makes a codicil, which he also procures to be attested by two witnesses, neither the will nor the codicil is adequate to the devise of freehold lands; for, though the attesting witnesses to both aggregately make up the requisite number, yet, as the memorandum of attestation subscribed to the codicil was evidently not intended to apply to the will, it cannot be so construed. *Lea* v. *Libb*, Carth. 35. If, however, evidence be adduced of such an intention, the attestation will apply to both. *Bond* v. *Seawell*, 3 Burr. 1775.

And, even without any positive evidence of intention, it seems that a memorandum of attestation will extend to a will and codicil, or several codicils written on the same sheet of paper. Thus, in the case of *De Bathe* v. *Lord Fingal*, 16 Ves. 167, where a testator made a will for the purpose, among other things, of appointing guardians to his children. This will was attested by one witness only. The testator afterwards executed a codicil to the will written on the same sheet of paper, and attested by three witnesses, and which was declared to be a codicil to his will thereunto annexed. The attestation was held to apply to the will, so as to constitute it a good testamentary appointment of guardians within the statute 12 Car. 2, c. 24, *ante*, p. 4.

Attestation held to apply to both will and codicil written on the same paper.

So, in the more recent case of *Guest* v. *Willasey*, 12 Moore, 2, where a testator, on the back of his will, which was duly attested, wrote three codicils of different dates, of which the last alone was attested by three witnesses, and which did not in terms refer to the preceding codicils, but merely partially revoked an appointment of executors made by the second codicil, it was held that the third codicil operated as a republication, not only of such second codicil, but also of the first, between the contents of which and of itself there was no connection. The term 'republication,' which was applied to this case (and would assign to it a different position in the present dissertation), seems not accurately to express the principle; for it is conceived that the true ground on which the case must stand, is, that the attestation of the third codicil was intended to apply to the three. Had they not been written on the same piece of paper, it is obvious that the point would have been more doubtful, though, in regard to the effect of the codicil as a republication of the will properly so called, this would have been immaterial.

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Again, in the case of *Doe* d. *Williams* v. *Evans*, 1 Cromp. & Mees. 42, where A. made a will, professing to devise freehold property, but which was neither signed nor attested, though an attestation clause was drawn out; a fortnight afterwards, a codicil was written below this clause on the same sheet of paper, in the following terms:—"I, A., make a codicil to the foregoing will, and thereby ordain that my wife, B., be entitled to 200*l.* of my property in case she marry." (There was no date). It was signed by the testator, and attested by three witnesses, thus— Witness J. W.
J. H. L.
W. H.

The Court of Exchequer held that the execution and attestation applied to the whole of what was on the paper, and, consequently, that the will was duly attested for the devise of freeholds. Much reliance was placed on the case of *Carleton* v. *Griffin*, and on the circumstance of the codicil referring to the will: Mr. Baron *Bayley* observing, that, if the codicil had not referred to the will, he should have thought that it did not set up that instrument.

It would not be safe to consider these cases as authorizing the general conclusion, that every codicil, attested by three witnesses, will communicate the efficacy of its attestation to the previous unattested will and codicils. The contrary was ruled in the early case of *Attorney-General* v. *Baines*, Pre. Ch. 270, S. C. 3 Ch. Rep. 150, where a testator wrote a will, in his own hand, but without witnesses; and afterwards made a codicil, wherein he recited and took notice of the will; which codicil was subscribed by four witnesses; and it was treated as clear, by the Lord Chancellor, that the will was inoperative to devise freehold lands. Either this case is overruled by the recent decisions, or the principle of those decisions must be confined to cases in which the will and codicil are written on the same paper; though, in *Doe* d. *Williams* v. *Evans*, the Court certainly relied principally on the reference in the codicil to the will. In *Guest* v. *Willasey* there was no such reference; but, the two instruments being on one paper seemed to render it unnecessary. Where this is not the case, it would at least be requisite that the codicil should, by a reference to date, or some other means, identify the unattested paper to which it refers, as the will of the testator.

Testator ma refer to extrinsic documents—

It is not to be doubted that a testator may so construct his disposition as to render necessary a reference to some document (as to any other extrinsic fact), in order to elucidate or explain his intention; and such a document need not be attested by three witnesses, it being referred to not in the character of a testamentary paper, or as a component part of the will. As, where a testator devises all lands which were conveyed to him by certain indentures (describing them), or devises to the uses expressed by a particular indenture of settlement, it is clear that

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the indentures so referred to might be consulted for this purpose, without any evasion of the enactment respecting wills in the statute of frauds; the testator's intention being manifested by a will duly attested, though in such a manner as to involve a reference to a circumstance dehors the will. See *Habergham* v. *Vincent*, 2 Ves. jun. 204; also *Molineux* v. *Molineux*, Cro. Jac. 144.

but cannot create a power to devise by an unattested codicil.

The attempt to create, by a will duly attested, a power to devise freehold lands by a future unattested codicil, is obnoxious to a very different train of reasoning. To allow such a paper to become supplementary to the contents of the will itself, would not only introduce all the evils against which the statute of frauds was directed, but would give to the will an operation in the testator's lifetime contrary to the fundamental law of the instrument. Accordingly, where a testator, by a will attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons, and for such estates, as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this power, executed an instrument attested by two witnesses, which he stiled a deed poll, and thereby carried on the series of limitations commenced in his will, it was decided, after much consideration, that this instrument operated as a codicil to the will, and was incapable of affecting the freehold lands, for want of an attestation by three witnesses. *Habergham* v. *Vincent*, 2 Ves. jun. 204, S. C. *nom. Stansfield* v. *Vincent*, 4 B. C. C. 353; *Rose* v. *Cunynghame*, 12 Ves. 29; *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422.

Land cannot be converted by will, so as to be disposable by unattested codicil.

Upon the same principle, it is clear that a testator cannot so convert his real estate into personalty by a will duly attested, as to render it disposable, by an unattested codicil, as personal estate. See *Sheddon* v. *Goodrich*, 8 Ves. 481; *Hooper* v. *Goodwin*, 18 Ves. 156; *Gallini* v. *Noble*, 3 Mer. 691.

General charge of legacies extends to those bequeathed by an unattested codicil.

In one instance only, and that founded upon special grounds, not interfering with the principle in question, the freehold estate of a testator is indirectly liable to be affected by an unattested codicil. This occurs where a testator has, by a will duly attested, charged his lands with legacies; which charge, it has been held, will extend not merely to the legacies bequeathed by that will, but also to such as may be bequeathed by an unattested codicil. *Hide* v. *Hide*, 1 Eq. Ca. Ab. 409, S. C. 3 Ch. Rep. 83; *Masters* v. *Masters*, 1 P. W. 421, S. C. 2 Eq. Ca. Ab. 192, pl. 7; *Lord Inchinquin* v. *French*, Amb. 33; *Brudenell* v. *Boughton*, 2 Atk. 268; *Habergham* v. *Vincent*, 2 Ves. jun. 204, S. C. 3 B. C. C. 353; *Buckeridge* v. *Ingram*, 2 Ves. sen. 652, S. C. 7 Ves. 652; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Wilkinson* v. *Adam*, 1 Ves. & Bea. 445.

Grounds of the doctrine.

This doctrine has been considered to be warranted by the rule applicable to the case of a general charge of debts; for, since a testator may, after charging his real estate with debts, increase the burthen on the land to an indefinite extent, by contracting fresh debts, without any fur-

ther direct act of oneration, it has been thought that a charge of legacies ought, by analogy to this rule, to include legacies given by an unattested codicil; in short, that, as a charge of debts extends to all debts which may happen to be owing at the testator's decease, so, a charge of legacies extends to all legacies which shall *then* happen to be bequeathed.

Express power to bequeath such legacies cannot be created.

The doctrine in question, adhering to the analogy in which it originated, is confined to the case of a simple and general charge. If, therefore, a testator, instead of creating a general charge of legacies (leaving it to the ordinary rule to determine what are legacies), subjects his freehold estate expressly to such legacies as he shall thereafter bequeath by an unattested codicil, this is considered as amounting, in effect, to the reservation of a power by will to dispose of the land by an unattested codicil. It differs from the case of a charge of legacies generally, in this respect, that, unless the codicil bequeathing a legacy expressed that the land should be charged therewith, it could not be charged, and therefore it is not chargeable on the land as legacy merely, but through the medium of an unattested testamentary instrument. *Rose* v. *Cunynghame*, 12 Ves. 29. Where a testator, after bequeathing certain legacies, devised his freehold estate for a term, for the purpose of raising them, and also the several other legacies *thereinafter* bequeathed; it was held by Lord *Eldon*, that certain additional legacies which he bequeathed by an unattested codicil, were not payable out of the real estate under the trusts, on the ground "that it was not a general charge of legacies." *Bonner* v. *Bonner*, 13 Ves. 379.

Whether the personalty must be primarily liable.

It is to be noticed, also, that a general charge, either of debts or legacies, onerates the land only as an auxiliary fund, the personalty being still primarily liable; which circumstance has been so often mentioned as an ingredient in cases of this nature, as to raise a doubt whether the rule under consideration would not be repelled by the absence of it; though, certainly, the analogy to a charge of debts suggests no such limitation of the doctrine; for, if a person charges his real estate with his debts, the charge will equally extend to all the debts which he owes at his decease, whether the personalty be exempted or not. At all events, it is clear that a testator, after having charged his real estate with legacies, without exempting the personalty from its primary liability, may, by an unattested codicil, bequeath any portion of his personal estate, exempt from the charge, which, of course, would have the same effect of augmenting the burthen upon the land, as an increase in the amount of the legacies. *Coxe* v. *Basset*, 3 Ves. 155.

As to the revocation of legacies by an unattested codicil.

In accordance with the suggested confinement of the doctrine to legacies payable out of the general personal estate, it seems to have been decided, that, though it is clear that such legacies, once charged by a will duly attested, may be revoked or modified by an unattested codicil; *Brudenell* v. *Boughton*, 2 Atk. 268, *Attorney-General* v. *Ward*, 3 Ves. 327; yet, that a sum, whether annual or in gross, which is charged speci-

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fically and primarily upon land, is susceptible of no alteration in regard to the subject or object of the devise, by means of an unattested codicil; and the circumstance that a particular portion of personal estate was combined with the realty in the charge, would not vary the principle. And therefore, where a testator devised an annuity out of a certain estate, *stock, and utensils,* it was held not to be affected by an unattested codicil expressly revoking it. *Beckett* v. *Harden,* 4 Mau. & Sel. 1. And even where a testator, by a will duly attested, gave all his real and personal estate to trustees, upon trust out of the rents of the real, and the produce of the personal estate, to pay his debts and funeral and testamentary expenses and legacies, and, in the next place, to pay two life annuities, and the testator, by a codicil attested by one witness only, revoked one of the annuities, it was held that such annuity continued a charge upon the real estate. *Mortimer* v. *West,* 2 Simons, 274. It seems difficult to say that this annuity was not charged primarily on the personal estate; (see *Fitzgerald* v. *Field,* 1 Russ. 425); and in this point of view the case stands alone.

Distinction where a new disposition of the charged property is attempted to be made.

But, even where the charge on the land is confessedly auxiliary, yet it seems that, if a testator, instead of expressly revoking the legacies bequeathed by his will, attempts, by an unattested will, to make an entirely new disposition of his freehold and personal estate, as this is operative on the personalty only, the legacies remain a charge on the realty; because the effect of what the testator has done, merely is to withdraw one of the funds on which the legacies were charged, and not the legacies themselves. *Buckeridge* v. *Ingram,* 2 Ves. jun. 652. And it would be immaterial that the will contained an express clause of revocation of all former wills. *Sheddon* v. *Goodrich,* 8 Ves. 500.

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2. *As to personal Estate and Copyholds.*

Stat. 29 Car. 2, c. 3. Concerning nuncupative wills.

All that the statute of frauds (29 Car. 2, c. 3) has required to the validity of wills of personalty and copyholds, is contained in the clauses regulating nuncupative wills. The 19th section provides, "That no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

Sect. 20 provides, "That, after six months passed after the speaking of the pretended testamentary words, no testimony shall be received, to

prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will."

Sect. 21 provides, "That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any Court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please."

Sect. 23 directs that any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his moveables, wages, and personal estate, as before the act. This clause has been considered to apply to seamen on board merchants' vessels. The wills of seamen and marines, and non-commissioned officers of marines, have been subjected to peculiar regulations, by stat. 26 Geo. 3, c. 63; 32 Geo. 3, c. 34, s. 1; 11 Geo. 4, c. 20, ss. 48, 49, 50; and 2 & 3 Wm. 4, c. 40, ss. 14 & 15.

General remark.

It is remarkable that the Legislature, which has so anxiously required devises of freehold estates to be attested by three witnesses, should have left every other species of property wholly unguarded by any such requisition; and still more, that this distinction has been allowed to continue until the present day, when, owing to various circumstances, particularly the practice of carving out long terms for years in land, and the immense investments on public securities, personal property has completely emerged from its former insignificance.

What a good will of personalty.

In two instances only does any attempt seem to have been made to subject wills of personal estate to a more formal mode of execution than is required by the enactment in question, whose requisition is considered to be satisfied by the will being put into writing during the lifetime and by the direction of the maker, though it has not been signed, and was never even seen by him. See *Allen* v. *Manning*, 2 Hagg. 490. And the ecclesiastical reports abound in cases in which papers have been received as testamentary, the execution of which was wholly prevented by the death of the testator. *Re Taylor*, 1 Hagg. 641. The two instances before referred to, in which the Legislature has imposed additional formalities of execution, in regard to particular subjects of personal estate, relate to estates *pur autre vie*, (which, when limited otherwise than to the heirs of the deceased owner, or not limited at all, are personal estate), to the devise of which the statute of frauds requires three witnesses; and stock in the public funds, which, it is provided by certain acts of Parliament, shall pass only by wills attested by two witnesses. But, these exceptions to the general rule have been rendered, in a great measure, practically nugatory, by the doctrine established by the case of *Ripley* v. *Waterworth*, 7 Ves. 425, that an executor taking freeholds *pur autre vie*, as special occupant. or even in the absence of special occupancy, was bound to deal with them as part of the

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general personal estate of the deceased owner. The same principle would clearly apply to stock in the public funds, and, probably, would extend to estates *pur autre vie*, and stock specifically bequeathed, which an executor would surely not be allowed to hold, in opposition to a specific legatee claiming under an unattested will.

Convenience attending the attesting of wills of personalty.

Prudence obviously suggests that testators should not avail themselves of the extreme limit allowed by the liberality or laxity of the rules of law in regard to the execution of wills of personal estate, but that such wills should invariably be not only signed, but also attested by two witnesses, as the want of such an attestation occasions the necessity, when the will is proved in the Ecclesiastical Court, of adducing proof of the handwriting of the testator, by affidavit. If the paper is not only unattested, but is unsigned (as where a will is prepared pursuant to the instructions of a testator, who dies before it is executed), the Prerogative Court will grant probate in common form, but not without the consent being obtained of the parties interested, or at least of such of them as are *in esse;* for, the rest will not be bound. *Re Taylor*, 1 Hagg. 641.

Copyholds not within the statute of frauds.

The exclusion of copyholds from the devising clause of the statute of frauds was the result of the narrow construction which that clause received from the Courts of judicature, rather than of any restrictive terms in the enactment itself, the language of which, in the opinion of some eminent judges, was sufficiently comprehensive to have warranted its application to copyholds. (See 2 P. W. 258; 1 Ves. sen. 227; 7 East, 322). It seems to have been thought, however, that, as copyholds passed by the surrender and will taken together, and not by the will alone, (the effect being the same as if the devisee's name had been inserted in the surrender), a will of copyholds was not a devise or bequest of lands or tenements, within the 5th and 6th sections of the act. (See 7 East, 322). It is observable, that the Legislature has not embraced the occasion so opportunely presented by the passing of the statute of 55 Geo. 3, c. 189, (stated *ante*, Vol. 3, p. 532), abolishing the necessity of surrenders to the use of wills, of placing freeholds and copyholds on an equal footing in regard to attestation.

What constitutes a will of personalty and copyholds.

The decisions, therefore, antecedent to the statute, are still applicable. According to those decisions, not only will an unattested paper writing, signed by the testator, operate as an effectual devise of copyholds, but testamentary papers, neither authenticated by the signature, nor even in the handwriting of the testator, have been held to be sufficient, the same having been, during the life of the testator, put into writing by his direction. (*Vide* cases *ante*, Vol. 3, p. 534). And, though the ground upon which copyholds were held, originally, not to be within the statute —namely, that the estate passed by the combined operation of the surrender and will—does not apply to equitable interests, which never could be the subject of a surrender, yet, the well-known maxim, *equitas sequitur legem*, requires that they should be governed by the same rule.

Tuffnell v. *Page*, 2 Atk. 37, S. C. 2 P. W. 261, n.; *Carey* v. *Askew*, 1 Cox, 243.

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As to incomplete papers.

But it is not always enough, in the execution of a will, that the general requirements of the law are satisfied; for, if the author of the paper in question has chosen to prescribe to himself a more formal or elaborate mode of execution, and afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitively resolved on adopting the paper as his will. On this ground, the Prerogative Court has, in several instances, pronounced against the admission to probate of papers which the testator had signed, but had not proceeded to attest, as he had evinced an intention to do. Thus, in the case of *Walker* v. *Walker*, 1 Mer. 503, the circumstances were as follow:—The will was signed and sealed by the deceased, and had a clause of attestation, in these words—"Signed, sealed, and declared by me, the said (*name*), to be my last will and testament, in the presence of us, who attested the same in the presence of each other" There was no subscribing witness. The will was found rolled up in a piece of coarse paper, on which the deceased had written—"I sealed and signed my will, to have it to be witnessed the first opportunity I could get proper persons for it." The deceased lived twelve years after the date of the paper. The Prerogative Court decided against the alleged will, and this decree was affirmed, after much argument, by the Delegates, 15th February, 1805.

Paper rejected, for want of attestation.

So, in the more recent case of *Beaty* v. *Beaty*, 1 Add. 154, where the deceased, who died on the 21st of March, 1822, left a testamentary paper, dated the 6th of June, 1820, signed by him, having an attestation clause in the following words—"Signed, sealed, and delivered, in the presence of," but which clause was not subscribed by any witnesses. A person who had attested a former will of the deceased, proved a conversation with him, in which the deceased said that he had destroyed the will formerly attested by him, and had made another, (meaning, it should seem, the paper in question). Sir *J. Nicholl* said—"As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed—the presumption of law is *against* a testamentary paper with an attestation clause not subscribed by witnesses." The learned Judge proceeded to observe, that the presumption against an instrument so circumstanced was a slight one, where the instrument, like that before the Court, was perfect in all other respects. Slight as it was, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate in its subsisting state, before it could be admitted to probate. In reference to the deceased's conversation with the attesting witness of the former will, the learned Judge ob-

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served, that the mere vague declarations of testators, that they have made their wills, are not always to be implicitly relied on, and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, that he has made a will, when he has *written* a testamentary paper, though unfinished*.

Distinction where the testator is prevented from performing the concluding act of authentication.

Where, however, the testator's design of perfecting the paper is frustrated by an inevitable event, such as sudden death, or insanity, no inference of the absence of matured testamentary intention arises from the imperfect state of the paper, which, therefore, notwithstanding its defect, will be received as the will of the deceased, provided it fully discloses his intended disposition. As in the case which arose on the will of the well-known William Huntingdon, where the facts were, that an attorney had taken down from the testator's own mouth his intentions respecting his property, and afterwards read them over to him. The draft so prepared was approved by the testator, and a fair copy directed to be made, and brought to him the next morning, to be executed as a will; but the testator died in the course of the night. Sir *J. Nicholl* held this circumstance, of the direction to the attorney to make a fair copy, and bring it next morning for execution, to be conclusive of the testator having fully made up his mind on the subject of his will, and accordingly pronounced for the validity of the testamentary paper. 2 Phill. 213. See also *Carey* v. *Askew*, 1 Cox, 241.

What an adequate preventing cause.

In order to warrant the reception of the unfinished paper, it is not necessary that there should have been a physical impossibility of the testator's completing it before his dissolution; it is enough that the obstacle was such as to account for the non-completion, without having recourse to the supposition of an immaturity or change of testamentary intention. Thus, where a person went to the office of his attorney, on the 10th of December, and gave him instructions for his will, promising to call and

* These cases appear to have overruled some early decisions, in which imperfect papers have been admitted as wills, unless those decisions can be referred to the principle next adverted to in the text, which seems doubtful, as but little allusion is made in them to the point now so much regarded —whether the non-completion of the instrument was the consequence of the voluntary neglect of the deceased, or of inevitable accident. See *Cobbold* v. *Baas*, 4 Ves. 200, n.; *Habberfield* v. *Browning*, Ib. In the case of *Roe* d. *Gilman* v. *Heyhoe*, 2 Blackst. 1114, an instrument which was signed only, was held to be a valid will for devising copyholds, (having been proved in the Ecclesiastical Court), though, in the testimonium-clause, it was referred to as being under the hand *and seal* of the testator. From the evidence, however, it appeared that the testator had subsequently treated it as his will.

execute the will, when prepared; which he never did, though he lived to the 15th: but, as the deceased did not afterwards leave his house, the state of his health being such as to render his doing so inconvenient, though not impossible; and, as an anxiety, expressed to the attorney, to conceal it from his (the deceased's) wife, supplied a reason for his not sending for the will, to be executed at home, the Court pronounced in favour of the written instructions taken down by the attorney, on the oral dictation of the deceased. *Allen* v. *Manning*, 2 Addams, 490.

Contents of the paper must be complete.

But this doctrine, in favour of imperfect papers, is only applicable where the defect is in regard to some formal or authenticating act, and not where it relates to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, the Court cannot carry it into effect, even though its completion was prevented by circumstances beyond his control. And therefore, where a person, while dictating his will to an amanuensis, is stopped by sudden decease, or the rapid declension of his mental or physical powers, such paper cannot be admitted to probate, as containing his entire will, without the most unequivocal testimony that the deceased considered it as finished; and the fact that the paper professes to dispose of the deceased's whole estate is not conclusive in its favour, because testators not unfrequently begin with such an universal disposition, and then proceed to bequeath specific portions by way of exception thereout. And the inference that the alleged will discloses part only of the intended disposition, would be strengthened by the fact of its not embracing persons who, from their intimate relationship to the deceased, and from the contents of a prior revoked will, it was rather to be expected would have been primary objects of his consideration. *Montefiori* v. *Montefiori*, 2 Addams, 354. See also *Griffin* v. *Griffin**, 4 Ves. 197, n.

Presumption against unfinished papers.

In short, the presumption is always against a paper which bears self-evident marks of its being unfinished; and it behoves those who assert its testamentary character distinctly to shew, either that the deceased intended the paper, in its actual condition, to operate as his will, or that he was prevented from completing it. *Reay* v. *Croucher*, 1 Hagg. 75, S. C. 2 Id. 249; *Wood* v. *Medley*, 1 Id. 661; *Re Robinson*, Id. 643†. And the Prerogative Court will not grant probate of such defective papers, without the consent or citation of the next of kin. *Re Adams*, 3 Id. 258.

Informal paper

It ought to be observed, however, that we are not to rank among in-

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* This case afforded two sufficient grounds for the rejection of the paper, *viz.*—1st, that it was not the whole will; and, 2ndly, that its completion was not prevented by inevitable circumstances.

† As to the contrary presumption in favour of a regularly executed and apparently complete will, *vide Shadbolt* v. *Waugh*, 3 Hagg. 570.

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intended as a present will.

choate or unfinished testamentary papers one which is evidently intended to perform the office of a present will, (if the expression is admissible), though appearing, by the language of its commencement, (in which it is intitled a memorandum of an *intended* will), to have been originally designed as instructions for a more formal instrument. *Barwick* v. *Mullings*, 2 Hagg. 225.

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VII. LAPSE—FAILURE OF PARTICULAR GIFTS—OPERATION OF RESIDUARY CLAUSES—CONSTRUCTIVE CONVERSION.

1. *Doctrine of Lapse.*
2. *Effect of Failure of particular Gifts.*
3. *Operation of a residuary Bequest.*
4. *Residuary Devise—Question whether Devisee takes beneficially, or as Trustee.*
5. *As to real Estate directed to be sold, and* vice versa*—Undisposed of Interests therein—Doctrine of constructive Conversion.*

1. *Doctrine of Lapse.*

Doctrine of lapse, what.

The liability of devises and bequests to failure, from the decease of the object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which, as they do not take effect until the death of the testator, can communicate no benefit to persons who previously die, in like manner as a deed cannot operate in favour of those who are dead at the time of its execution. The doctrine applies indiscriminately to gifts with and without words of limitation.

Applied to devises in tail and in fee.

Thus, if a devise be made to A., and his heirs, or to A. and the heirs of his body, and A. dies in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general, of A., takes no interest in the property, he being merely included in the words of limitation, *i. e.* in the terms which are used to mark the quantity or duration of the estate to be taken by the ancestor through whom alone any title could flow to such heir. *Brett* v. *Rigden*, Plow. 345; *Fuller* v. *Fuller*, Cro. El. 422; *Wynn* v. *Wynn*, 3 B. P. C. Toml. ed. 95; see also *Goodright* v. *Wright*, 1 P. W. 397; *Ambrose* v. *Hodgson*, 3 B. P. C. Toml. ed. 416.

—To bequests of personalty.

Bequests of personal property of course are subject to the same principle; and it is observable, that, in applying it to them, a legacy to one, and his executors or administrators, is construed simply as an absolute gift; *Elliott* v. *Davenport*, 1 P. W. 83*; the circumstance, that, in the

As to the lapse of legacies forgiving debts.

* In this case, the legacy was of a debt, which is liable to lapse equally with gifts in any other form. *Toplis* v. *Baker*, 2 Cox, 118. It is true, that, in *Sibthorpe* v. *Moxton*, 1 Ves. sen. 49, S. C. *nom. Sibthorpe* v. *Moxton*, 3 Atk. 580, Lord *Hardwicke* held, that the forgiving of a debt,

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instance of personal estate, words of limitation are not requisite to carry the absolute interest, not having been considered sufficient to denote an intention to make the executors or administrators substituted and independent objects of gift.

Effect of death before the making of the will.

And, where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to vest the subject in the representatives of the deceased person. *Maybank* v. *Brooks*, 1 B. C. C. 84.

—Of declaration that gift shall not lapse.

And even a declaration that the devise or bequest shall not lapse, does not *per se* prevent it from being defeated by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of those on whom the law, in the absence of disposition, casts the property, is by giving it to some one else. But, such a declaration accompanying a bequest to a person *and his executors or administrators*, would be considered as indicating an intention to substitute the executors or administrators for the original legatee. *Sibley* v. *Cook*, 3 Atk. 572.

The insertion of the word "or," between the name of the devisee or legatee and the words of limitation, as in a gift to one *or* his heirs, or to him *or* his executors or administrators *or* personal representative*, will not vary the construction, the expression being regarded as an inaccurate mode of annexing words of limitation to the gift, and not as designed to create a substitutional gift, in the event of the failure of the first by lapse. *Stone* v. *Evans*, 2 Atk. 86; *Wright* v. *Wright*, 1 Ves. sen. 409; *Read* v. *Snell*, 2 Atk. 642; *Corbyn* v. *French*, 4 Ves. 418, 435; *Tid-*

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coupled with a general direction to the executor to deliver up the security, (without saying to whom), operated as a release, though the legatee died in the testator's life-time—his Lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; his Lordship admitting, however, that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland* v. *Adair*, 3 Ves. 231, the words were—"I return A. his bond." A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. *Roper* (Treat. Leg. 411), who has dwelt more on the merely verbal distinction between the giving and forgiving of a debt, than seems warranted by the principles of the cases.

* But, in *Girdlestone* v. *Doe*, 2 Sim. 225, a bequest of 40*l. per annum* to A. for life, and, after her decease, to B. *or* his heirs, was held not to give B. the absolute interest, but to create a substitutional gift, in case of B. dying in the lifetime of A.

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Gifts to persons *or* their heirs, &c.

well v. *Ariel*, 3 Madd. 403. And where a testator, resident in India, bequeathed a share of his personalty to A., "who resided at L. when I left England, *or* to his heirs, executors, administrators, or assigns for ever," Sir *L. Shadwell*, V. C., held, that, A. having died in the testator's lifetime, the legacy failed; his Honor being of opinion that the additional words were too uncertain to create a substitutional gift. *Waite* v. *Templer*, 2 Sim. 524.

Courts indisposed to construe gifts as substituting representatives.

So strong, indeed, is the indisposition of the Courts, in construing wills, to give to representatives what was designed primarily for, but never vested in the deceased himself, that though, by the general rule, it is clear, that, where a legacy is bequeathed, the payment of which is expressly deferred to a future period, with a gift over in the event of the legatee's dying before the legacy becomes payable, the gift over is construed as applying to death in the lifetime of the testator, as well as to death afterwards; *Walker* v. *Main*, 1 Jac. & Walk. 1; yet, it seems, that, where the substituted objects of gift are the executors or administrators of the legatee, (and the same principle would seem to apply to any other class of representatives), the construction is different, and they will only be entitled in the event of the legatee dying in the interval between the death of the testator and the time of payment or distribution. *Bone* v. *Cook*, M'Clel. 168. Nevertheless, if the will supplies no other period to which the words in question can be referred, (as, where the gift is of a pecuniary legacy, payable immediately on the testator's decease), death before the time of payment is, from necessity, construed to mean death in the lifetime of the testator.

Gift to next of kin of a married woman.

And here it may be noticed, that a bequest to the next of kin of a married woman, in the event of her dying in the lifetime of her husband, has received very much the same kind of consideration as a bequest to heirs, or executors and administrators; namely, as being intended merely to modify the interest of the legatee in case of her dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse, in the event of the legatee dying under similar circumstances in the testator's lifetime. Thus, where a testator bequeathed to trustees 10,000*l.*, to be invested in stock, in trust for A., a married woman, during the joint lives of herself and her husband, and, in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and, in default of appointment, to her next of kin, exclusive of her husband: A. died in the lifetime of her husband and the testator; and it was held that the legacy lapsed. *Baker* v. *Hanbury*, 3 Russ. 340.

No lapse, on death of a joint devisee.

It is to be observed, that, where a gift is made to a plurality of persons, as joint tenants, (which is always the construction in the absence of words of severance, in regard to both real and personal estate, *Cooke* v. *De Vandes*, 9 Ves. 197; *Swaine* v. *Burton*, 15 Ves. 365), no lapse can

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occur, unless *all* the objects die in the testator's lifetime; because, as joint tenants take *per mis et per tout*, or, as it has been expressed—"each is a taker of the whole, but not wholly and solely," (Carter, 4), any one joint tenant, existing when the will takes effect, will be entitled to the entire property. Thus, if lands are devised to A. and B., or to them and their heirs, or personal property is bequeathed to A. and B., and one dies in the testator's lifetime, the other surviving the testator will take the whole. *Davis* v. *Kemp*, Carter, 4, 5; S. C. Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628. And the same consequence would ensue, if the gift failed from any other cause; *Humphrey* v. *Tayleur*, Amb. 136, S. C. 7 Bac. Abr. Gwill. ed. 363; *Larkins* v. *Larkins*, 3 Bos. & Pull. 16; *Short* d. *Gastrell* v. *Smith*, 4 East, 419; while it is equally clear, that, if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift, as to one object, would not have entitled the others to the whole, without an express gift over of the share of the deceased object in such event. *Page* v. *Page*, 2 P. W. 489.

Gifts to classes.

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, the decease of any of such persons during the testator's lifetime will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying never become objects of the gift. Thus, if property be given generally to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any children or child, brother or sister, surviving the testator, without regard to previous deaths; *Doe* d. *Stewart* v. *Sheffield*, 13 East, 526; and the rule is the same where the gift is to the children of a person then deceased; which has this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase, the possibility of future accessions by births being precluded by the death of the parent. *Viner* v. *Francis*, 2 B. C. C. 658, S. C. 2 Cox, 190.

Distinction where the individuals of the class are ascertained before the lapse.

If, however, the class is defined at some period occurring in the testator's lifetime, the subsequent decease of any of its members, in the interval between that period and the decease of the testator, would occasion the lapse of their shares, precisely in the same manner as if the gift had been originally made to them *nominatim*. Thus, if the gift be to the children of A. *who shall be living at the decease of A.*, as tenants in common, and A. dies in the testator's lifetime, leaving four children, one of whom afterwards dies in the lifetime of the testator, the one fourth share of such child would lapse, as it would have done if, in the first instance, the gift had been made to the four children by name. *Allen* v. *Callow*, 3 Ves. 289. In this case, the point did not arise; but Lord *Alvanley* ex-

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pressed a decided opinion on it. Perhaps it would have been a sounder rule to say, that the throwing into the description of children an additional ingredient, such as that of requiring that they should be living at a given period, does not vary in other respects the construction applied to the gift.

Gift to next of kin of a person deceased.

It does not appear to be settled what would be the effect of a gift to some other classes of persons, as, to the next of kin, or relations, as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in the cases where such gifts have occurred, (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words to sever the joint tenancy. *Bridge* v. *Abbot*, 3 B. C. C. 224; *Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n.

Alternative gifts.

Where there are several alternative gifts, and the legatee in whose favour the contingency happens dies in the lifetime of the testator, the legacy lapses precisely in the same manner as if it had been originally absolute. So, if the person whom the event determines to be the object of the gift, survives the testator, the bequest to him would not be affected by the event of the death of the alternative legatee. Thus, if a testator gives to A. an estate, or a sum of money, in case he shall attain the age of twenty-one years, and, if A. shall die under that age, to B., and A. happens to attain twenty-one, and then dies in the lifetime of the testator, the legacy will lapse; while, on the other hand, if A. had died in the lifetime of the testator, under that age, the gift to B. would have taken effect. *Doo* v. *Brabant*, 3 B. C. C. 392, S. C. 4 Durn. & East, 705; see also *Ledsome* v. *Hickman*, 2 Ver. 611; *Willing* v. *Baine*, 3 P. W. 113; *Calthorpe* v. *Gough*, 3 B. C. C. 394, n.; *Humberstone* v. *Stanton*, 1 Ves. & Bea. 385; *Walker* v. *Main*, 1 Jac. & W. 1; *Williams* v. *Jones*, 1 Russ. 517.

Effect of lapse of devise of onerated lands.

And here it may be noticed, that, where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if a man devises Blackacre to A. and his heirs, charged with or on condition that he pay 50*l.* a year, or the sum of 500*l.* to B., in case A. should die in the testator's lifetime, the estate would descend to the heir-at-law, subject to the charge. *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Worley*, 2 Atk. 605.

This principle is strongly exemplified by a case in which a person having a power of appointment over a sum of money, by will appointed a smaller sum, part of the fund in question, to A., and, in consideration thereof, he was to pay to his mother an annuity of 100*l.* during her life, for her separate use, and to enter into a bond, with a penalty, for the payment thereof; and the testatrix gave the residue of what she had

power to dispose of to B. A. died in the donee's lifetime; but it was held, that, nevertheless, the mother was entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee. *Oke* v. *Heath*, 1 Ves. sen. 135.

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2. *Effect of Failure of particular Gifts.*

FAILURE OF PARTICULAR GIFTS.

Having shewn, generally, in what instances lapse is produced by the decease of a devisee or legatee in the testator's lifetime, the next inquiry concerns the destination of the property so intended to be given; in considering which, a distinction is to be drawn between gifts of partial interests only, and those which include the whole or entire estate or interest of the testator. First, as to the former—

Effect of death of devisee for life, &c.

Where a gift for life, or any other such partial estate, is followed by a limitation over of the residuary interest, the death of the prior devisee or legatee, in the lifetime of the testator, causes the ulterior gift to take effect *in possession;* and sometimes the circumstance that the precedent interest is removed out of the way in a manner not expressly provided for by the terms in which the remainder is limited, will not prevent this from taking place. As, if a testator devises lands to A. and the heirs of his body, and, if he dies without issue, or without leaving issue, then over, and A. dies in the testator's lifetime, leaving issue, the devise in remainder will take effect, though, according to the literal expressions of the will, the event described has not happened, the words in question being evidently used merely as a mode of framing the remainder expectant on the estate tail; (as, if the testator had said—" I give to A. in tail, with remainder over);" and not as designed to render it dependent on the contingent determination of the preceding estate. The prior devise, therefore, failing by lapse, the ulterior devise operates as an immediate gift. *Fuller* v. *Fuller*, Cro. El. 423.

—Of gifts void, or refused.

So, if a devise for life or in tail is void, or is refused by the devise, it seems by the better opinion, that the devise in remainder will be accelerated. Perk. sect. 557, 569; Shep. Touchst. 435, 451; *Fuller* v. *Fuller*, Cro. El. 425; *Cranmer's case*, Dy. 309 *b;* but see and consider *Carrick* v. *Errington*, 2 P. W. 361, S. C. 5 B. P. C. Toml. ed. 391. As to the destination of terms of years created by the will, but the beneficial interest in which is not entirely disposed of, see *Tregonwell* v. *Sydenham*, 3 Dow, 194; *Davidson* v. *Foley*, 2 B. C. C. 203; *Sidney* v. *Shelley*, 19 Ves. 352.

Devise over, not defeated by failure of prior devise.

A strong instance of the construction which reads a secondary or substituted devise as intended to take effect in all events in which the prior devise is removed out of the way, occurs in the case of *Avelyn* v. *Ward*, 1 Ves. sen. 420, where a testator devised his real estate to A. and his heirs, on condition that, within three months after his decease, he should execute a general release to the testator's trustee, of all demands; and, in default, the testator devised the estate to B. and his heirs. A. died in

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the lifetime of the testator; and Lord *Hardwicke* held, that the devise to B. took effect, the evident intention being, that, if in any event the first devise could not take place, the subsequent should; and that, if no such release was executed, whereby the demand against his estate would exist, the estate should go over. See also *Scatterwood* v. *Edge*, 1 Salk. 229; *Doe* v. *Scott*, 3 Mau. & Sel. 300.

Effect of lapse of devise of money charged on land.

Another species of question occurs where lands are devised, subject to the payment of a sum of money, annual or in gross, and the charge fails by the death of the devisee thereof in the lifetime of the testator, or otherwise. It is clear, that, if the charge is to arise on a contingency which does not happen, it is extinguished, and the devisee of the property has the benefit of such extinction, as the devise of the land evidently includes the interest comprised in the incumbrance, in the events alternative to those on which it is to arise. Thus, if lands were devised to A. in fee, charged with the payment to B. of 500*l.*, in case B. should attain the age of twenty-one years, and B. died under that age, in the lifetime of the testator, or afterwards, the charge would sink for the benefit of the devisee. *Attorney-General* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60; *Sydenham* v. *Tregonwell*, 3 Dow, 212. If B. attained the age of twenty-one years, and afterwards died in the lifetime of the testator, the point is more doubtful, depending, as it then does, on the general question, whether a sum of money primarily and absolutely payable out of land lapsing, becomes extinguished therein, or subsists for the benefit of the heir, as real estate undisposed of; which has never been decided. (But see and compare *Hutcheson* v. *Hammond*, 3 B. C. C. 128, 148, and *Noel* v. *Lord Henley*, 7 Price, 240, 1 Dan. 212, 322). And the inquiry into it would not be much aided by appealing to the decisions respecting the destination of a sum of money, the charge of which fails *ab initio*, on account of the illegality of its object, (as where it is devoted to charity), since the following is a brief statement of the result of those decisions. The cases of *Arnold* v. *Chapman*, 1 Ves. sen. 108, and *Bland* v. *Wilkins*, cit. 1 B. C. C. 61, where the charge was of a gross sum, and *Gravenor* v. *Hallum*, Amb. 643, where it was a perpetual rent-charge, are in favour of the heir. And the case of *Jackson* v. *Hurlock*, 2 Eden, 263, where the charge was of a gross sum, and the cases of *Barrington* v. *Hereford*, 1 B. C. C. 62, and *Baker* v. *Hall*, 12 Ves. 497, where it was annual, are in favour of the devisee of the land. In the case of *Sidney* v. *Shelley*, 19 Ves. 363, Lord *Eldon* referred to the principle in terms which might seem rather to favour the claim of the heir; but he described the cases as turning upon extremely nice distinctions. In fact, they are so directly conflicting, that no distinctions, however refined, can reconcile them. If the charged property were leasehold, there can be little doubt that a lapsed or void legacy charged on it would sink for the benefit of the spe-

Rule where the devise of the charged sum is void *ab initio*.

cific legatee, whose title would seem to be preferable to that of the general residuary legatee.

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We now proceed to consider the effect of the lapse or failure of absolute gifts, *i. e.* gifts including the testator's entire interest. If the lapsed devise or bequest were general or residuary, the result necessarily would be, to let in the title of the heir-at-law to real estate, and of the next of kin to personalty. If it were a particular devise or bequest, then the relative claims of the residuary devisee or legatee on the one hand, and of the heir-at-law or next of kin on the other, would require to be adjusted upon the principles respectively governing residuary clauses in regard to real and to personal property, which in many respects are widely different.

RESIDUARY BEQUEST.

3. *Operation of Residuary Bequest.*

Residuary bequest includes all the property at the death.

A will of personal estate comprises all the property belonging to the testator at the time of his decease; and such, it is clear, would be its operation, even without words expressly pointing at future acquisitions; as, where the bequest is in general terms of the testator's property or effects. Indeed, so averse are the Courts to suppose an intention in the testator to confine the disposition to present personal property, which would generally produce a partial intestacy, that even a gift of all the property "*I am* possessed of," has been thought not to have this restrictive effect; (see *Wilde* v. *Holtzmeyer*, 5 Ves. 816; see also *Bland* v. *Lamb*, 2 Jac. & Walk. 399); though, generally speaking, verbs and adverbs expressive of present time refer to the date of the will. See *Abney* v. *Miller*, 2 Atk. 597. But the inconvenience of so restricting the disposition, of course, will not weigh against a clearly expressed intention. See *Davers* v. *Dewes*, 3 P. W. 40.

Its operation in relation to lapsed gifts.

The necessary consequence of holding a residuary bequest to operate upon the property as it exists at the death, is, that there cannot be an intestacy in regard to any the least part of the personal estate, while there is an operative residuary gift, since it comprises whatever does not eventually pass under the specific and particular bequests of the will, as well those which are originally void, as those which lapse by the decease of legatees in the lifetime of the testator; *Jackson* v. *Kelly*, 2 Ves. sen. 283; *Brown* v. *Higgs*, 4 Ves. 708; even though it should become, by this means, a bequest of the entire personal property. But, of course, a residuary clause may be so specially framed as not to take in lapsed legacies. *Attorney-General* v. *Johnstone*, Amb. 577. A gift, however, of the residue of real and personal estate "not hereinbefore specifically disposed of," has been held to include specific legacies lapsing, the words being read, "not hereinbefore *particularly* disposed of." *Roberts* v. *Cooke*, 16 Ves. 451.

Legacy to residuary legatee.

It is to be observed, too, that an express declaration that a legacy

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shall, in the event of the legatee dying before the testator, fall to the person who is made residuary legatee, is not wholly without effect, since it places the residuary legatee, in respect of the legacy in question, in the situation of a particular legatee; so that, in the event of a deficiency of assets, he would be liable to abate only *pari passu* with other legatees of the same class. *Rose* v. *Rose*, 17 Ves. 347.

Failure of gift of residue itself.

But, when the disposition of an aliquot share in the residue itself fails, intestacy is produced to the extent of such failure; for instance, in the case of a residue given in moieties, to hold that one moiety lapsing would accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole; whatever argument applies to the entirety of the moiety applies to every part of it: the distinction is mere subdivision. *Per* Sir *T. Plumer*, judgment in *Skrymshe* v. *Northcote*, 1 Swanst. 570. See also *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 489; *Owen* v. *Owen*, 1 Atk. 495; *Peat* v. *Chapman*, 1 Ves. sen. 542. So, where the residue was bequeathed to three persons as tenants in common, the revocation by a codicil of the bequest as to one of the three legatees was held not to entitle the other two, but to let in the title of the next of kin to such one third share. *Cheslyn* v. *Cresswell*, 2 Ed. 123; S. C. in Dom. Proc. 3 B. P. C. Toml. ed. 246. But, the postponement of the possession, or even of the vesting of the residuary personal property to a period subsequent to the testator's death, does not necessarily produce intestacy as to the intermediate income, which would accompany the capital in its final destination. Thus, if a testator bequeaths the residue of his personal estate to such of the children of A. as shall happen to attain the age of twenty-one, the income accruing in the interval between the death of the testator and the happening of the vesting event will pass, together with the capital, to the legatees, *Butler* v. *Butler*, 2 Atk. 473; 3 Atk. 58; *Trevanion* v. *Vivian*, 2 Ves. sen. 430; *Bullock* v. *Stones*, Id. 521, (supposing the accumulation not to be carried beyond the legal term; *vide ante*, p. 65). And, if the bequest failed in event, by reason of A. having no child who survived the testator, and lived to attain the age of twenty-one, the accumulated income, with the capital, (unless there was an alternative disposition of them), would go to the testator's next of kin, as personalty undisposed of. See *Chambers* v. *Brailsford*, 18 Ves. 368.

Future gift of residue.

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4. *Operation of a Residuary Devise—Question whether a Devisee takes beneficially or as Trustee.*

Every devise of realty specific.

As a will of real estate operates only on the property of which the testator is seised at the time of its execution (*vide ante*, p. 8), it follows that every devise, however general in terms, is necessarily specific; see *Hill* v. *Cock*, 1 Ves. & Bea. 175; and a residuary devise can have no wider extent of operation, than if the testator, instead of devising the rest of his estate, had given by name the lands he had not previously disposed

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of. Such a devise, therefore, is incapable of being enlarged by subsequent events to a comprehension of any subject not originally within its reach; so that, if a devise in fee of particular lands lapses by the death of the devisee in the testator's lifetime, the residuary devisee is not entitled to stand in the place of such deceased devisee. *Wright* v. *Hall*, Fort. 182; *Roe* v. *Fludd*, Id. 184.

Effect of particular devises lapsing.

—being void *ab initio.*

And this principle might seem to apply with exactly equal force to a devise which is void *ab initio;* for, if a man, being seised of Blackacre and Whiteacre, devised Blackacre to A. in fee, and the residue of his lands to B., the latter devise, viewed in this light, would amount only to a devise of Whiteacre, and could not, it should seem, be extended to Blackacre, in case it should turn out that the devise of the latter was void, from its being in favour of charity, or from any other cause affecting its validity at the time of the execution of the will. A different doctrine, however, appears to have obtained in several instances. Thus, in the case of *Doe* d. *Stewart* v. *Sheffield*, 13 East, 527, where a testator, after devising lands to the sisters of J. H., devised certain other estates, and all his other lands and hereditaments whatsoever and wheresoever, *and not thereinbefore disposed of*, to S. and his heirs; the Court of King's Bench treated it as clear, that, if the devise to the sisters of J. H. had failed, by reason of there being no object living at the execution of the will, (but which did not prove to be the fact, there being *one* sister, who was held to be entitled to the whole), *the heir would have been excluded by the residuary devise. Le Blanc*, J., thought that this was clear, independently of the words "not hereinbefore disposed of;" upon which others of the Judges relied. Perhaps these words do not much vary the principle, because they merely shew (what is always to be presumed) that a testator conceives the preceding devises of his will to have disposed of the estates purporting to be given by them; the words therefore are synonymous with "not hereinbefore *expressed to be* disposed of."

So, in the case of *Williams* v. *Goodtitle* d. *David*, 10 Barn. & Cress. 895, (stated *post*, in the section on Republication), the Court of King's Bench took it for granted that a devise of all the residue of the testator's real estate not thereinbefore disposed of, would pass an estate which had been devised "upon trusts that were bad in law." See *Page* v. *Leapingwell*, 18 Ves. 453; *Jones* v. *Mitchell*, 1 Sim. & Stu. 293.

Operation of residuary devise on undisposed of interests.

In exact consistency with the principle which has been advanced in regard to residuary devises, it is settled, that, if the particular devises of the will dispose of less than the testator's entire estate in the subject-matter, the residuary devise will attach on the remaining estate, precisely in the same manner as if such interest had been in terms given to the residuary devisee. Thus, if lands of inheritance are devised to a person for life or in tail, a residuary clause will carry the reversion in fee expectant on such estate for life or estate tail; *Cooke* v. *Gerrard*, 1 Lev. 212;

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Willows v. *Lydcot*, 2 Vent. 285; *Doe* d. *Briscoe* v. *Clarke*, 2 New Rep. 343; and which reversion, in the event of the death of the devisee for life or in tail in the lifetime of the testator, would, at the death of the testator, vest as an estate in possession. And the reversion in fee would not be excluded by the fact that the devise was expressed to embrace only the lands *not before devised*, (for these words would be considered as referring to the interest, and not to the *corpus* of the lands; *Rooke* v. *Rooke*, 2 Vern. 461); or by the fact that it was made in favour of the particular devisee for life or in tail himself; who, therefore, by the combined operation of the particular and residuary devise, would take the entire fee-simple; *Ridout* v. *Pain*, 3 Atk. 486; see also *Bradford* v. *Belfield*, 2 Sim. 264; *Williams* v. *Goodtitle*, 10 Barn. & Cres. 895; or by its appearing that the residuary property was charged with the payment of an immediate annuity. *Doe* v. *Fossick*, 1 Barn. & Adol. 186.

—on lands contingently devised in fee.

So, where the particular devise disposes of the fee-simple, in certain events only, the residuary clause will carry the fee in the alternative events. Thus, if lands are devised to A. in fee, in case he shall attain the age of twenty-one years, or to the children of B. who shall be living at his decease, and the residue of the real estate to C. in fee, it is clear, that, if A. should die under twenty-one, or no child of B. should be living at his decease, the property would belong to C., by virtue of the residuary devise. *Doe* v. *Scott*, 3 M. & Selw. 300; *Doe* v. *Fossick*, 1 Barn. & Adol. 186; see also Willes, 300. And there can be no doubt that the principle would equally apply where a testator, after devising an immediate estate in fee, makes it defeasible on a certain event; the executory fee arising on such event, if not otherwise disposed of, would pass by the residuary clause, though the contrary seems to have been considered in the case of *Doe* v. *Pearson*, 6 East, 173 (*a*).

—on the immediate income of lands devised *in futuro*.

And it is to be observed, that, wherever the immediate rents and profits are left undisposed of by any particular devise in the will, the residuary clause will carry such rents and profits, (which would otherwise descend to the heir, *Stephens* v. *Stephens*, Cas. Temp. Talb. 228); and they would not be excluded from such residuary devise, by the circumstance of its containing a trust for sale, which might seem not very apposite to an interest of this nature; for, though such an argument might have weight in construing equivocal expressions, it cannot cut down the effect of clear unambiguous words. *Duffield* v. *Duffield*, 3 Bligh, P. C. 261, New Series.

(*a*) The unwillingness of the Court, in this case, to give to the residuary devise its fair operation presents a singular contrast with the anxiety evinced in the subsequent case of *Doe* v. *Sheffield*, 13 East, 526 (commented on *ante*, p. 99), to push its effect beyond what is warranted either by principle or authority.

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The result of the whole seems to be, that there can be no intestacy in regard to any portion of the real estate of which a testator is seised when he makes his will, if that will contains a valid and operative residuary devise, and all the particular devises in the will take effect.

General remark.

In applying the doctrine, that the ulterior beneficial interest in particular lands, previously devised for partial purposes, passes by a residuary devise, a previous, and, sometimes, rather nice question is, whether the particular devise vests in the devisee beneficially such ulterior interest, or leaves it undisposed of, so as to let in (if there had been no residuary gift) the title of the heir. In regard to this, the distinction seems to be, that, if I give to A. and his heirs all my real estate, *charged with* my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is *upon trust* to pay my debts, that is a devise for a particular purpose, and nothing more; the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. *Per* Lord *Eldon* in *King* v. *Denison*, 1 Ves. & Bea. 272. In *Hill* v. *Bishop of London*, 1 Atk. 618, where a testator devised an advowson to his honoured mother-in-law, G. H., willing and desiring her to sell and dispose thereof to certain colleges, Lord *Hardwicke* considered the devise to be beneficial, being only an injunction on the devisee to enjoy the thing devised in a particular manner.

Distinction between beneficial and fiduciary devises.

So, in the case of *Rogers* v. *Rogers*, 3 P. W. 193, where a testator made and constituted his dearly beloved wife his sole executrix, and heiress of all his lands and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, the devisee was held to take beneficially, subject to the debts and legacies, to the exclusion of the heir. And, in the more recent case of *King* v. *Denison*, 1 Ves. & Bea. 261, S. P. *Smith* v. *King*, 16 East, 293, the same construction was given to a devise of the testatrix's real estate to her cousin, the wife of R., and to her cousin A., their heirs and assigns for ever, *subject nevertheless to, and chargeable with*, the payment of the annuities thereinafter mentioned. (See further, on this point, *Wych* v. *Packington*, 3 B. P. C. Toml. ed. 44; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Coningham* v. *Mellish*, Pre. Ch. 31).

Examples of beneficial devises.

Of course, the mere circumstance of a pecuniary legacy being given to the heir, will not rebut a resulting trust in his favour. *Starkey* v. *Brooks*, 1 P. W. 390; (see also *Randall* v. *Bookey*, 2 Vern. 425); but parol evidence, it seems, is admissible for the purpose. *Mallabar* v. *Mallabar*, Cas. Temp. Talb. 78.

UNDISPOSED OF REALTY DIRECTED TO BE SOLD.

5. *Real Estate directed to be sold—Undisposed of Interests therein—Doctrine of Constructive Conversion.*

As to undisposed of interests in realty directed to be sold.

Where real estate is directed to be sold for particular purposes, the conversion is considered as made for those purposes, and no farther; and, in the event of their entirely or partially failing, the property, or the unapplied portion of it (as the case may be), retains its original character of real estate, and devolves, as such, to the real representative. Thus, if a testator devises his lands of inheritance to trustees, upon trust to sell for the payment of debts, in aid of the personal estate, or with a direction to pay the monies arising from the sale to A., and the produce of the sale is not required for payment of debts, the personalty being sufficient, or A. dies in the testator's lifetime, the beneficial interest in the land, if unsold, or the produce thereof, if a sale has taken place, belongs to the heir, as real estate undisposed of, and not to the next of kin, the conversion being made for the purposes of the will only, and the claim of the next of kin arising *dehors* the will. *Ackroyd* v. *Smithson*, 1 B. C. C. 503; *Robinson* v. *Taylor*, 2 B. C. C. 589; *Chitty* v. *Parker*, 4 Id. 411, S. C. 2 Ves. jun. 271; *Collins* v. *Wakeman*, Id. 683; *Hill* v. *Cock*, 1 Ves. & Bea. 173; *Gibbs* v. *Rumsey*, 2 Ves. & Bea. 294; *Dixon* v. *Dawson*, 2 Sim. & Stu. 327. And the rule is the same where the vacancy in the disposition is occasioned, not by the disappointment or failure of the testator's purpose (as in the examples just put), but by the original contractedness of that purpose. As, where lands are devised upon trust for sale, and the proceeds are directed to be invested upon trust for A. for life, and no farther disposition is made of the produce of the sale, the ulterior interest devolves to the heir, as real estate. *Wilson* v. *Major*, 11 Ves. 205. See also *Robinson* v. *Taylor*, 2 B. C. C. 589. And an express declaration that the monies arising from the sale shall be deemed personal estate, will not entitle the next of kin, since the declaration will be construed as intended to apply only to persons claiming under the will, and not to regulate the devolution of the property *aliunde*. *Countess of Bristol* v. *Hungerford*, 2 Vern. 645.

Produce of realty will not pass by residuary bequest.

Even in regard to the will itself, a mere devise in trust for sale does not constitute the produce personalty, for all purposes. For instance, it will not pass under a general or residuary bequest of personal estate. Thus, if a testator devises his real estate to trustees, in trust for sale, for the payment of his debts, or directs the produce to be invested in trust for A. for life (making no farther disposition), and bequeaths his personal estate to A., the latter bequest would not pass the interest in the real estate not exhausted by the devise. *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, Id. 205; *Halliday* v. *Hudson*, 11 Ves. 205; *Maugham* v. *Mason*, 1 Ves. & Bea. 410. However, a declaration that the monies arising from the sale shall be considered as part of the personal estate, will have the effect of making them pass by a general or residuary bequest of personalty.

Collins v. *Wakeman*, 2 Ves. jun. 683. And this construction will prevail, whenever, from the whole will, such an intention can be collected. *Mallabar* v. *Mallabar*, Cas. Temp. Talbot, 78; *Kellet* v. *Kellet*, 3 Dow, 248; *Brown* v. *Bigg*, 7 Ves. 280.

UNDISPOSED OF REALTY DIRECTED TO BE SOLD.

A residuary devise of real estate will, beyond all doubt, carry the undisposed of produce of particular lands devised to be sold. As, if a testator devises Blackacre to trustees, upon trust to sell for payment of debts, and then devises all the residue of his real estate to A. in fee, such part, if any, of the produce of Blackacre as should not be wanted for payment of debts, would belong to A., under the residuary clause; *Goodtitle* v. *Knot*, Cowp. 43; since it would result to the heir, if there were no such clause. *Culpepper* v. *Aston*, 2 Ch. Cas. 115, 221. But, if the devise of the produce of particular lands lapses by the death of the devisee in the testator's lifetime, it is clear, that, by the effect of the same principle which would exclude the lands themselves from passing by the residuary devise, such devise would not operate on the fund in question.

——will pass by residuary devise.

Where a sum of money which is payable out of the produce of lands, unmixed with the produce of the personal estate (*a*), lapses, it either devolves to the heir, as an undisposed of portion of a real fund, or falls into the residue of such fund, for the benefit of the devisee. In the case of *Hutcheson* v. *Hammond*, 3 B. C. C. 128, 148, Mr. Justice *Buller* and Lord *Thurlow* successively held, that the lapsed sum belonged to the heir, as real estate; but, in the subsequent case of *Noel* v. *Lord Henley*, 7 Price, 240; S. C. 1 Dan. 212, 322, the House of Lords, without noticing the former decision, determined in favour of the residuary devisee of the fund.

Destination of lapsed legacy out of produce of realty.

The destination of a similar sum, the devise of which, being for an illegal purpose, fails *ab initio*, is equally doubtful, as will appear by the following statement of the leading authorities. In *Page* v. *Leapingwell*, 18 Ves. 463, a testator devised certain real estates to trustees, in trust to sell, and, out of the monies arising therefrom, to pay certain legacies, including two sums of 200*l.* to the poor of two parishes, and to apply the overplus for the benefit of certain persons. There was also a general disposition of the residue of his real and personal estate not thereinbefore disposed of. Sir *Wm. Grant*, M. R., observed, that the disposition as to the 200*l.* was void, as a devise to a charity, and therefore lapsed (*b*). According to the decree, however, his Honor appears to have decided, that

Effect where legacy is void *ab initio*.

(*a*) As to the effect of this circumstance, *vide post*, p. 104.

(*b*) The Editor, in stating this case in a former publication (2 Jarm. Pow. Dev. 86), was led, by the observations which fell from the Master of the Rolls, into a misconception of the real import of the decision, as disclosed by the decree.

UNDISPOSED OF REALTY DIRECTED TO BE SOLD.

the 200*l.* went, not to the heir, as might have been expected from his remarks in the judgment, *but to the general residuary devisee.*

Remark on *Page* v. *Leapingwell.*

It does not appear whether Sir *Wm. Grant* grounded his opinion on the general doctrine, that a residuary devise would take in the subject-matter of particular devises failing from circumstances existing at the time of the execution of the will, or whether he considered that this effect was produced by the words *not thereinbefore disposed of,* in accordance with the opinion of the Court of King's Bench, in the case of *Doe* v. *Sheffield* (*ante,* p. 99), of which, as well as *Williams* v. *Goodtitle* (*ante,* p. 99), the decision of the Master of the Rolls might seem to be powerfully confirmatory, were it not that the decision itself is irreconcileable with the subsequent case of *Jones* v. *Mitchell,* 1 Sim. & Stu. 293, where A. devised his real estate (after certain limitations) to trustees, in trust to be sold, and, out of the monies to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B., Sir *J. Leach,* V. C., held that the void legacy of 800*l.* belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

Case of *Jones* v. *Mitchell* considered.

The only distinction between this case and *Page* v. *Leapingwell* is, that, in the latter case, there was a general residuary devise, distinct from the gift of the produce of the sale; but this circumstance seems to be immaterial; for, where, as in *Jones* v. *Mitchell,* the entire residuary real estate is subject to a trust for sale, the residue of that fund is, in effect, the residue of the whole real estate. It is to be regretted, therefore, that the attention of the Vice-Chancellor was not drawn to the decision of the Master of the Rolls.

There are several other cases corroborative of the principle of *Jones* v. *Mitchell;* but the Editor has forborne to give them prominence in the discussion, because they appear to carry the claim of the heir beyond the limits assigned to it by other decisions. Such is the case of *Cruse* v. *Barley,* 3 P. W. 20, where a legacy payable out of the produce of real estate, and which failed by the death of the legatee before the vesting age, was held to belong to the heir, in disregard of the doctrine now well established, that real estate, given upon a contingency which does not happen, passes under the residuary clause. The cases of *Collins* v. *Wakeman,* 2 Ves. jun. 683, and *Gibbs* v. *Rumsey,* 2 Ves. & Bea. 294, are also decisions in favour of the heir, who was held to be entitled to legacies payable out of the produce of real estate, which, in the former case, had been reserved for a future disposition that was never made, and, in the latter, was illegally given to charity. But, a circumstance which impairs the authority of both these cases is, that the produce of the real was blended with the general personal estate, which has been repeatedly held to form

Rule where produce of realty and personalty are blended.

a ground for giving to the residuary legatee of the mixed fund any sum payable out of the produce of the realty, the devise of which fails by reason either of the decease of the devisee in the testator's lifetime or of the illegality of the purpose to which it is devoted; the intention being, according to the words of Sir *R. P. Arden*, in *Kennell* v. *Abbott*, "to make the real estate to all intents and purposes personal." *Malabar* v. *Malabar*, For. 79; *Durour* v. *Motteux*, 1 Ves. sen. 320; *Kennell* v. *Abbott*, 4 Ves. 802; *Amphlett* v. *Parke*, 1 Sim. 275; *Green* v. *Jackson*, 5 Russ. 55. This point, therefore, is free from the uncertainty which, in other respects, so deplorably hangs over the relative claims of the heir and residuary devisee, in regard to lapsed and void devises—extending, as we have seen, to the destination of lands of inheritance, the devise of which is void *ab initio* (but which, lapsing, *clearly* go to the heir), and also to the destination of a sum of money absolutely and primarily charged on lands, or payable out of the produce of land, in the event of the devise of such sum either lapsing or failing *ab initio*. It would have been well if the Courts had pertinaciously adhered to the principle, that every devise of land, or of the produce of land, is specific, which would have precluded the reading of a gift of a *residue* of such property, as constituting, in any possible event, a gift of the *whole*. Perhaps the state of the authorities is not such as to render this even now impracticable. The establishment of some general doctrine, resting on a basis sufficiently broad to comprehend all these cases, would be far better than any attempt to draw distinctions between them, which would only tend to perpetuate uncertainty, and with it the litigation which that uncertainty will sooner or later inevitably invite.

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General remark on the cases.

It seems to be decided, that, where a testator gives, out of the produce of land, a sum of money to a person to be thereafter named by him, and dies without making any such nomination, the sum constitutes an interest in real estate, which descends to the heir, as the testator has evinced an intention, at all events, that it shall not go to the devisee of the residue of the fund, though he has not determined to whom else to give it. *Collins* v. *Wakeman*, 2 Ves. jun. 683; *City of London* v. *Garway*, 2 Vern. 571 (*a*).

Effect where sum is excepted, but not disposed of.

Generally speaking, the principles which govern the disposition of lands directed to be sold, apply with equal force in the converse case of

Lapse of legacy directed to be laid out in land.

(*a*) But, *quære* whether, in the first of these cases cited, the general personal estate was not, in the first instance, liable to the payment of the monies payable out of the real fund, and whether, in the second, there was not an express alternative gift to the residuary legatees, in the absence of the intended paper?

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money being directed to be laid out in land. These principles would seem to require, that, where the bequest fails by lapse, or by the illegality of the purpose to which it is devoted, the legacy should fall into the residuary bequest, as part of the general personal estate; and such appears to be the effect of an early case, though the doctrine was not expressly recognised as the ground of decision. *Durour* v. *Motteux*, 1 Ves. sen. 320. But, in another instance, where a sum of money was directed to be laid out in land, to be settled on A. for life, without any farther disposition, the ulterior interest was held to devolve to the heir, as real estate, *Fletcher* v. *Chapman*, 3 B. P. C. Toml. ed. 1, and not to go as personalty to the next of kin or residuary legatee, by analogy to the rule which entitles the heir, in the converse case of lands being devised to be sold, and the produce disposed of for life only. (*Vide ante*, p. 102).

Doctrine of constructive conversion.

And here it will be convenient to take some notice of constructive conversion, or, in other words, of that doctrine which imparts to property qualities and incidents different from those which belong to its actual state, under the principle of equity, which considers that as done which is agreed or directed to be done.

Lands directed to be sold, considered as personal estate, and *vice versâ*.

Where a person takes, under a deed or will, property which, by that deed or will, is directed to be converted, he, of course, takes it in the character which the instrument has impressed upon it. Thus, if lands are devised in trust to be sold, and the produce laid out on security as personal estate for the benefit of A. for life, with remainder to B. absolutely; upon the decease of B. his personal representative would be entitled to the produce of the land, subject to the prior life-interest, as part of his personal estate, although the lands should actually remain unsold; while, in the converse case, namely, of money being directed to be laid out in land, to be settled to the use of A. for life, with remainder to B. in fee, the money, though not laid out, would be real estate of B., and, as such, would, at his decease, devolve to his heir or devisee. *Guidott* v. *Guidott*, 3 Atk. 254; *Pulteney* v. *Darlington*, 1 B. C. C. 224; S. C. 7 B. P. C. Toml. ed. 530; *Fletcher* v. *Ashburner*, 1 B. C. C. 497; *Attorney-General* v. *Holford*, 1 Price, 426.

Conversion must be absolute.

In order to change the nature of property, however, the direction to convert must be absolute. Thus, if a discretion is lodged in trustees to invest money in land or personal security, there will be no conversion in law until there is a conversion in fact. *Van* v. *Barnett*, 19 Ves. 102. And, probably, the requisition of the consent of third persons would be held to have the same effect. (See *Thornton* v. *Hawley*, 10 Ves. 129). But, a devise over, in a certain event (which does not happen), of so much of the land as should remain unsold, has been held not to prevent the prior legatee of the produce of the land from taking it as personal estate, there being no inconsistency in saying that it shall be personalty as to the first taker, and real estate with respect to

the second. *Ashby* v. *Palmer*, 1 Mer. 296, more fully from MS. 2 Jarm. Pow. Dev. 64; see also *Crabtree* v. *Bramble*, 3 Atk. 680.

DOCTRINE OF CONSTRUCTIVE CONVERSION.

Land directed to be sold will sometimes be personal estate, even in the hands of the heir, though his claim must originally attach to it in the character of real estate. The distinction seems to be, that, where the disposition for the purposes of which the conversion is directed to be made, *wholly* fails, the property is real estate of the heir, and, on his decease, would devolve to his real representative; but, where there is a partial failure only of those purposes, as, where the heir takes by lapse, or otherwise, an aliquot share, or an interest ulterior to that of a legatee for life, the property forms part of his personal estate; since the conversion directed by the will would still be required *quoad* the other undivided share or the interest for life, in respect to which the will takes effect. *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Madd. 484.

Heir takes land as personalty, when.

It is in the power of any person absolutely entitled to property which is directed to be converted, to elect to take it in its actual, as distinguished from its destined state. For this purpose, of course, it is necessary that the party should be personally competent to change the nature of the property, and should have evinced an intention to do so. What acts have this effect has been the frequent subject of adjudication. Entry upon and the letting for a term of years of an estate devised to be sold, would clearly be an election to take it as land. *Crabtree* v. *Bramble*, 3 Atk. 680. And, placing out on security, as the absolute property of the party, money which was directed to be laid out in land, would evince an intention to treat it as personalty. *Lingen* v. *Sowray*, Pre. Ch. 400, S. C. 1 P.W. 172. And, in either case, a will or other instrument disposing of the property, by an express description adapted to its actual condition, would, of course, determine its constructive character accordingly. *Triquet* v. *Thornton*, 13 Ves. 345.

Person entitled may elect to take property in its actual state.

What amounts to election.

It appears, in one instance, to have been decided, in conformity to a dictum of Lord *Macclesfield* in the case of *Edwards* v. *Countess of Warwick*, 2 P. W. 173, that the election may be made by parol; *Chaloner* v. *Butcher*, cit. 3 Atk. 685; though the contrary was asserted by Lord *Hardwicke* in the case of *Bradish* v. *Gee*, Amb. 229. At all events, the intimation of intention, by whatever means made, must be explicit and unequivocal; *Stead* v. *Newdigate*, 2 Mer. 531; and, therefore, one may be permitted to doubt whether Sir *W. Grant*, in the case of *Triquet* v. *Thornton*, 13 Ves. 345, was fully warranted in holding that a bequest of the residue of the testator's personal estate, in possession *or reversion*, demonstrated an intention to bequeath, as personalty, a reversionary fund impressed with the character of real estate, on the ground that the testator had no other reversionary personal estate, seeing that a bequest of this nature extends to after-acquired personal estate; so that the cir-

Whether parol declaration sufficient.

DOCTRINE OF CONSTRUCTIVE CONVERSION.

cumstance of the testator possessing no other reversion when he made his will, raises no necessary implication that he had this or any other particular fund in his contemplation.

REVOCATION.

VIII. REVOCATION.

1. *By Marriage and the Birth of Children.*
2. *By Cancellation or Obliteration.*
3. *By an Alienation or Interruption of the Testator's Estate.*
4. *By a void Conveyance.*
5. *By a subsequent revoking or inconsistent Will or Codicil.*

1. *By Marriage and the Birth of Children.*

Will of *feme sole* revoked by marriage.

Where a *feme sole*, having made a will, marries, her will is revoked, and seems, by the better opinion, to continue so, even after the determination of the coverture, though she may happen to be discovert at the period of her death. *Forse and Hembling's case*, 4 Rep. 61, S. C. 1 And. 181; *Cotter* v. *Sayer*, 2 P. W. 624; *Doe* v. *Staple*, 2 D. & E. 695. See also *Hodsen* v. *Lloyd*, 2 B. C. C. 533 (*a*).

Not that of a man.

The marriage of a man, however, has no such revoking effect, because it does not take away his testamentary capacity, and probably because, too, the law has created for the wife a provision by means of dower, of which the will of her husband cannot deprive her (*b*); nor does the birth of children alone revoke a will made after marriage, since a married man must be supposed to contemplate the having children; and the circumstance that the testator left his wife ensient, without knowing it, has been held not to impart to the birth of such posthumous child any revoking operation. *Doe* v. *Barford*, 4 Mau. & Selw. 10.

Marriage and birth of child revoke.

Marriage *and* the birth of children conjointly, however, will revoke a will either of real or personal estate, these circumstances producing such

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(*a*) In this case it was held, that a power in a marriage settlement to the lady *after* the marriage to devise, was not well executed by a will made before marriage.

(*b*) This reasoning only applies to real estate, but the rule, it should seem, extends to wills of personalty. In the case of *Johnston* v. *Johnston*, 1 Phill. 447, Sir *J. Nicholl* held, that a will of personalty was revoked by the birth of children, coupled with circumstances, the chief of which appears to have been that of the testator having prepared the outline of a new will differing from the former. The recent act of 3 & 4 W. 4, c. 105, stated *post*, places dower under the absolute dominion of the husband.

a total change in the testator's situation as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged. This rule was applied by the Ecclesiastical Courts to wills of personal estate at an early period. *Overbury* v. *Overbury*, 2 Show. 242; *Lugg* v. *Lugg*, 2 Salk. 592; *Brown* v. *Thompson*, 1 Eq. Ca. Ab. 413, pl. 15; *Eyre* v. *Eyre*, 1 P. W. 304, n.; and cas. cit. 2 Eden, 266, 1 Phill. 478; and was more recently and reluctantly extended to devises of freehold estates, its application to which had been previously thought to be precluded by the statute of frauds; (see *Parsons* v. *Lanoe*, 1 Ves. sen. 192; *Gibbons* v. *Caunt*, 4 Ves. 848); but the case of *Christopher* v. *Christopher*, Dick. 445; S. C. cit. 4 Burr. 2182, which occurred in 1771, and another decision which speedily followed, (*Spragge* v. *Stone*, cit. Doug. 35), closed all controversy on the point. The case of *Christopher* v. *Christopher* also shews that the revocation is not confined to the case of an unmarried testator, but also takes effect where he is a married man, who survives his wife, marries again, and has issue by his second wife. The circumstance that the child is posthumous does not neutralize the revoking effect of its birth, though the expectation of such birth was never disclosed to the testator, as the doctrine does not suppose that, in every particular instance, an intention to revoke actually exists; but it annexes to the will a tacit condition that the party does not intend it to come into operation, if there should be a total change in the situation of his family. *Doe* v. *Lancashire*, 5 Durn. & E. 49.

Rule applies to married testators.

Birth of posthumous child.

It has never been decided, whether, to produce revocation, the children must spring from the subsequent marriage, or it is sufficient that a testator has future children of an existing marriage, survives his wife and then marries again, but has no children by the second wife. In *Gibbons* v. *Caunt*, 4 Ves. 848, Lord *Alvanley* inclined to the conclusion that the order of the events made no difference, and that the will was equally revoked in either case.

Whether child must spring from future marriage.

Marriage and the birth of issue do not absolutely, but merely presumptively, produce revocation; and the presumption may be repelled by circumstances demonstrative of a contrary intention on the part of the testator. The best possible evidence of this is a provision in the will itself for the future wife and children, which, whatever be its amount, unequivocally shews that the testator contemplated the possibility of his standing in the marital and parental relations. *Kenebel* v. *Scrafton*, 2 East, 530. Indeed, a provision for the children alone would clearly be sufficient, because the birth of children necessarily supposes marriage; and the case of *Brown* v. *Thompson*, 1 Eq. Ca. Ab. 413, pl. 15, appears to have decided the less palpable point, that a provision for the wife, exclusively of children, would negative the presumed revocation.

Provision in will for wife and children prevent revocation.

In the Ecclesiastical Courts, it is even held, that the will remains un-

Also provision by settlement.

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revoked where the wife and children are provided for by settlement. *Talbot* v. *Talbot*, 1 Hagg. 705; *Johnston* v. *Wells*, 2 Hagg. 561 (*a*).

As to will disposing of less than whole estate.

It has never been decided whether the rule for presuming a revocation would apply where the will disposes of less than the whole estate, though the reported cases supply the negative opinions of Lord *Mansfield* (*Brady* v. *Cubit*, Doug. 31) and Lord *Ellenborough*, (*Kenebel* v. *Scrafton*, 2 East, 541). Supposing this to be clear, would a will, which actually, though not professedly, disposes of the testator's entire estate, as where there are particular gifts sufficient to absorb the whole, but no residuary disposition, be considered as falling within the principle?

No revocation where its only effect would be to let in pre-existing child.

It is important to observe, that marriage and the birth of a child or children revoke a will only where the effect of throwing open the property to the disposition of the law would be to let in such after-born child or children; for, if it would operate for the exclusive benefit of a pre-existing child, the ground for subverting the will evidently fails. Thus, where a testator having a son, makes a will, marries again and has issue, the will is not revoked as to real estate, since the revocation would have no other effect than that of causing the lands (supposing them to be descendible according to the course of the common law) to descend to the pre-existing son, who would necessarily be senior to every child of the subsequent marriage. Thus, in the case of *Sheath* v. *York*, 1 Ves. & Bea. 390, a testator having a son and two daughters, devised his real and personal estate to be sold for payment of his debts and for the benefit of these children. The testator was at that time a widower, he married again, and had issue one child. On a bill filed by the creditors for a sale, the question was raised whether the will as to the real estate was revoked; Sir *W. Grant* held, that it was not. "In all the cases," said his Honor, "the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate disposed of by a will made before his birth. The condition implied in those cases was, that the testator, when he made his will in favour of a stranger or more remote relation, intended that it should not operate, if he should have an heir of his own body. In this case, there is no room for the operation of such a condition, as this testator had children at the date of the will, of whom one was his heir apparent, who was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children, *those children not deriving any benefit whatever from the revo-*

(*a*) In this case it was a second marriage, and other circumstances were adverted to, but the main stress was on the settlement provision.

cation, which would have operated only to let in the eldest son to the whole of that estate, which he had, by the will, divided between the eldest son and the other children of the first marriage."

The reasoning of the Master of the Rolls extends only to cases in which the heir is among the pre-existing children; and it is probable that the revocation would take effect, notwithstanding the existence of such children, where the consequence of intestacy would be to cast the estate upon one of the *subsequently born* children (being an eldest or only son), or upon the children of both marriages (the whole consisting of daughters). And this conclusion is strongly aided by the circumstance, that, in regard to personal estate, which is distributable among all the children *pari passu*, it is well settled, that a will is revoked by a subsequent marriage and birth of children, notwithstanding the prior existence of children. *Holloway* v. *Clarke*, 1 Phill. 341. See also *Gibbons* v. *Caunt*, 4 Ves. 849; *Wright* v. *Netherwood*, 2 Salk. Evans's ed. 593, n. In the preceding observations it has been assumed that the application of the doctrine under consideration causes intestacy, but this is not necessarily the case; for, its effect might be to revive a prior uncancelled will, which contained a provision for the wife and children, protecting it from the revocation which the marriage and the birth of children produced on the subsequent will.

Existence of prior children does not prevent revocation as to personalty.

At one period it appears to have been supposed, that, if the child or children, whose birth had revoked or contributed to revoke the will, died in the lifetime of the testator, this event would restore its efficacy; the reasoning being founded on a fancied, but evidently mistaken analogy to the case of a will whose potential operation has been restored by the destruction of a subsequent revoking or inconsistent will. *Wright* v. *Netherwood*, 2 Evans's Salk. 593, n.; 2 Phill. 266, n. The latter doctrine, however, is evidently a simple consequence of the ambulatory state of a will during the testator's lifetime, and stands upon grounds that have no application to the class of revocations under consideration; and therefore it has been in later times most properly adjudged, that a will, once revoked by marriage and the birth of a child, continues revoked, notwithstanding the decease of such child before the will takes effect. *Burrow* v. *Baxter*, Amb. 490; *Hellyer* v. *Hellyer*, cit. 1 Phill. 412; *Sullivan* v. *Sullivan*, cit. 1 Phill. 343; *Emerson* v. *Bovil*, 1 Phill. 342.

Effect of children dying in testator's lifetime.

It has never been decided whether the presumed revocation resulting from marriage and the birth of children can be rebutted by parol evidence. In the case of *Brady* v. *Cubit*, Douglas, 31, Lord *Mansfield* considered the evidence to be admissible; though his decision does not rest exclusively upon this ground, and his Lordship's opinion has not received the countenance of subsequent judges. It was warmly opposed by Lord Chief Justice *Eyre*, in the case of *Goodtitle* v. *Otway*, 2 Hen. Blackst. 522; the Chief Justice observing, that, in cases of revocation by operation of law, the *præsumptio juris* is so violent, that it does not ad-

Whether revocation may be rebutted by parol evidence.

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mit of circumstances to be set up in evidence to repel it. So, in *Doe* v. *Lancashire*, 5 Durn. & E. 61, Lord *Kenyon* and Mr. Justice *Buller* strongly expressed their objection to, and disregard of the parol evidence which had been adduced to shew that the testator intended to make another will, excluding the child whose birth (with the previous marriage) produced the revocation. Lord *Alvanley*, in *Gibbons* v. *Caunt*, 4 Ves. 848, said, that he believed they went the length of admitting the evidence, but he did not like it. In *Kenebel* v. *Scrafton*, 5 Ves. 663; S. C. 2 East, 530, parol evidence of an intention not to revoke was offered; but Lord *Rosslyn*, on sending the case to the Court of King's Bench, observed, "that the parol evidence did not weigh at all; being only conversations, and not amounting to a republication, a Court of law would pay no regard to it." But the Judges of that Court came to a conclusion which rendered it unnecessary for them to enter into the question of the admissibility of the evidence.

As the Judges of the present day are averse to the admission of parol evidence, for the purpose of affecting the operation of written instruments, it is much more probable that they will follow the respectable opinions which have been cited for its rejection, than yield to the alternative conclusion, in deference to the solitary case of *Brady* v. *Cubit*, unless it should be deemed expedient to adopt a rule uniform with that of the Ecclesiastical Courts, where the evidence is admitted in regard to wills of personal estate; see *Calder* v. *Calder*, cit. 1 Phill. 472; *Gibbens* v. *Cross*, 2 Ad. 455; which might seem to be recommended by the consideration, that, as the statute of frauds has excluded parol revocations no less of wills of personalty than of devises of freehold estates, the principles applicable to the two species of wills are not, in regard to the point under discussion, materially different.

2. *By Cancellation or Obliteration.*

Cancellation revokes a will, when.

Revocation by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence and by his directions, is, we have seen, expressly recognised by the statute of frauds, and is not required to be attested by witnesses; so that, in this respect, wills of freehold and personal estate stand upon the same footing. In every case the question is *quo animo* the act was done, which is a conclusion to be drawn by a Court or jury from all the circumstances. The mere physical act of destruction is itself equivocal, and may be deprived of all revoking effect by explanatory evidence. Thus, if a testator unintentionally throws ink upon his will instead of sand, 1 P. W. 346, or obliterates it during a fit of insanity, *Scruby* v. *Fordham*, 1 Addams, 74, it will remain in full force, notwithstanding this accidental or involuntary obliteration; while, on the other hand, if he casts the will into the fire, with the intention of destroying it, but it is preserved without his knowledge by a third person, the revocation is nevertheless complete. *Bibb* v. *Thomas*, 2 Blackst. 1043.

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So, the destruction of the will by a third person in the lifetime, but without the knowledge of the testator, would not affect its validity; a *fortiori* if effected after his decease. *Haines* v. *Haines*, 2 Vern. 241.

Effect of partial cancellation, or

Where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and afterwards, being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury was done; it was held that the will remained unrevoked. *Doe* v. *Perks*, 3 Barn. & Ald. 489. In a recent case, the Prerogative Court decided in favour of a will, without any distinct evidence of its existence after the death of the testator, or of its destruction in his lifetime, there being strong reason, under all the circumstances, for supposing that the testator had unintentionally destroyed it, or at all events that its destruction, whenever effected, was without his concurrence. *Davis* v. *Davis*, 2 Add. 223. The rule in that Court seems to be, that, if a will is traced into the testator's possession, and cannot afterwards be found, it is to be presumed that he destroyed it; *Lillie* v. *Lillie*, 3 Hagg. 184; *Penhallow* v. *Robinson*, Id. 189, n.; but that, if the will is traced out of the deceased's custody, it is incumbent on the party asserting the revocation, to prove that the will came again into such custody, or was destroyed by his directions. *Colvin* v. *Fraser*, 2 Hagg. 327.

—Destruction of *one* part only,

Where there are two parts of a will, and the devisor cancels one, the presumption in general is, that he intends to destroy the effect of both; *Sir Edward Seymour's case*, cit. 1 P. W. 346; S. C. 2 Vern. 742; *Burtonshaw* v. *Gilbert*, Cowp. 49; see also *Utterson* v. *Utterson*, 3 Ves. & Bea. 122; but the strength of such presumption depends upon circumstances. If the uncancelled part was in the possession of a third person (Cowp. 49), the *animus revocandi* is clear beyond question, since the testator has cancelled all that was within his reach; *Boughey* v. *Moreton*, 3 Hagg. 191, n.; if both parts were in the testator's possession, and but one is found uncancelled, the act is more equivocal; and if, in addition to this, it appears that the cancelled will was first altered by the testator, and then cancelled, together with the alterations, it is rather to be presumed that the testator, being dissatisfied with those alterations, had designedly cancelled the part of the will which contained them, and had preserved the unaltered duplicate, with the view of recurring to his original intention. *Pemberton* v. *Pemberton*, 13 Ves. 310. And the presumption, it seems, would be in favour of the will, where one part was found *partly* mutilated, and the other carefully preserved, both being in the testator's own possession. *Roberts* v. *Round*, 3 Hagg. 548.

Where a testator had, both in his will and in a codicil to it, expressed the same intention (namely to exclude a child (*a*)) from participating in

(*a*) Here, it will be observed, the obliteration has the effect of enlarging the disposing contents of the will.

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a gift made in favour of his children generally, and had expunged the words declaratory of such intention from the codicil alone, this was held to let in the child. *Utterson* v. *Utterson*, 3 Ves. & Bea. 122.

The revocation, by cancellation or any other means, of a will extends to a codicil, the contents of which are founded on and connected with the will, so as to render it incapable of an independent operation. *Usticke* v. *Bawden*, 2 Addams, 116. And, in the Ecclesiastical Court, the general presumption from the cancellation of a will is in favour of the revocation of an uncancelled codicil, even in the deceased's own possession, though liable to be repelled by evidence of a contrary intention, *Medlycott* v. *Assheton* 2 Addams, 229.

Effect of partial obliterations.

If the testator draws a pen over certain parts of the will only, a revocation is effected *pro tanto*, and the unobliterated portions remain in force; *Sutton* v. *Sutton*, Cowp. 812; as, where (to put a simple and ordinary case) a testator, after having devised property to several persons, strikes out the name of one of those persons, by this act he gives to the will the same operation as if the devisee had died in the testator's lifetime. If the estate or interest of the co-devisees was joint, the entire property would vest in the surviving joint tenants, (*ante*, p. 92), if they were tenants in common, the share of the deceased devisee would lapse, and a partial intestacy be produced, unless the subject of gift were a pecuniary legacy, or any other article of personal estate, which would fall to the residuary legatee if there was one.

It should seem that the mere obliteration, by the testator, of the words referring to his will on the envelope of such will, would not amount to a revoking act of cancellation, and especially where it was accompanied by a memorandum, shewing that the testator considered the will to have been superseded by a subsequent one contained in the same envelope, but which turned out to be ineffectual for want of an attestation by three witnesses, the property being freehold; *Grantley* v. *Garthwaite*, 2 Russ. 90; for, it is to be observed, that, where the act of cancellation is connected with the making of another will, so as fairly to raise the inference that the testator meant it to depend upon the efficiency of the new disposition, the transaction will be viewed in this light; and accordingly, if the will intended to be substituted fails of effect from defect of attestation, or any other cause, the revocation will fail also, and the original will will subsist in unimpaired efficacy. As, where a testator having some time before executed a will duly attested, to each sheet of which a seal was affixed, gave to his solicitor instructions to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals from the old will; when, after all the seals but one had been thus removed, he was informed that the new will would not be operative upon his lands in its then state, which induced him to desist; and before the new will was complete the testator died: it was held that the former will remained unrevoked. *Hyde* v. *Hyde*, 3 Ch. Rep

Cancellation where connected with a new disposition.

155. See also *Onions* v. *Tyrer*, 1 P. W. 343, S. C. Pre. Ch. 459; *Sutton* v. *Sutton*, Cowp. 812; *Winsor* v. *Pratt*, 5 J. B. Moore, 484.

And the same principle applies to partial alterations; so that, where a testator strikes out the name of one devisee, at the same time interlining that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative, (as it necessarily is in regard to freeholds, if unattested), the obliteration will also fail of effect. *Short* v. *Smith*, 4 East, 419 (*a*); *Kirke* v. *Kirke*, 4 Russ. 435.

Effect of cancelling the posterior of two wills.

Where the posterior of two existing wills is cancelled by the testator in his lifetime, the effect of such cancellation clearly is, to re-instate the prior will in its original predicament, as the only subsisting will of the testator; and such restored will, if not revoked by any subsequent act of the testator, will take effect as such at his decease. This is an inevitable consequence of the ambulatory character of the instrument, which character of course pervades its whole contents—extending no less to an express clause of revocation than to every other part; and hence the distinction, sometimes suggested, between cancelled wills which do and those which do not contain such clauses, in regard to their revoking effect upon an earlier uncancelled will, is wholly without foundation. And even the Ecclesiastical Courts, which for a long period entertained the doctrine that a cancelled will, with a clause of revocation, revoked a prior uncancelled one (*vide* cases cited in *Moore* v. *Moore*, 1 Phill. 412), have greatly modified, if not wholly abandoned it; for, in a late case, Sir *John Nicholl* laid it down, that the legal presumption was neither adverse to nor in favour of the revival of a former uncancelled, upon the cancellation of a later revocatory will. The question was open to decision either way, according to facts and circumstances, and which in the case then before the Court were thought strongly to favour the revival. *Usticke* v. *Bawden*, 2 Addams, 116.

3. *Revocation by an Alienation or Interruption of the Testator's Estate.*

Revocation by alienation.

The two species of revocation treated of under the former sections affect the entire will. The present embraces specific gifts only, among which, we must remember, is to be classed every devise of land, in whatever terms expressed. To such a devise it is essential not only that the testator be seised at the time of the execution of the will, but that he continue so seised without interruption until his decease.

—absolute sale.

The most obvious instance of revocation by parting with the estate is, where a testator absolutely sells and conveys it in his lifetime, the effect of which, of course, is to revoke the devise; and if, by the will, the estate had been given to trustees for sale, with a direction to divide the pro-

(*a*) This case, however, did not raise the precise point.

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duce among certain persons, such legatees would have no claim to the monies arising from the testator's sale, though they can be traced into an investment on security, which security, in the case referred to, partly consisted of a mortgage on the sold estate. *Arnald* v. *Arnald*, 1 B. C. C. 401.

—Renewal of lease.

Another familiar case of revocation occurs where property held by leases for lives is surrendered by the testator after the making of the will, in consideration of a new lease being granted; which renewal, by conferring on the testator a different estate from that which existed at the execution of the will, necessarily revokes the devise.

—where the lease is freehold.

Thus, in the case of *Marwood* v. *Turner*, 3 P. W. 163, where A., being seised of the manor of S., held by a lease for three lives, devised the said leasehold estate for the three lives to two trustees and their heirs, whom he directed to renew the lease. The testator subsequently surrendered the lease, and took a new one. Lord Chancellor *King* held that the renewal of the lease was a revocation of the devise, for, by this surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall; *and the new purchase, being of a freehold descendible, could not pass by a will made before such purchase.*

—where for a term of years.

The renewal of a chattel lease (whether absolute or determinable with lives) has a similar revoking effect upon a specific bequest, the language of which is not specially pointed to the future term; though it is observable that *here* the revocation is produced, not by any principle of law forbidding the testamentary disposition of the after-acquired property, (as in the instance of *freehold* leases), but by the inapplicability of the terms of the bequest to such property. Thus, in *Abney* v. *Miller*, 2 Atk. 593, where A., being possessed of two college leases, made his will, and thereby gave and devised all his college leases which he then held of Magdalen College—Lord *Hardwicke* decided, that a renewed lease, granted subsequently to the making of the will, did not pass. He observed, that this was not a devise of the land, but a devise of the leases "which *I hold*" of Magdalen College; so that it was the same as if the testator had said "I devise a term," and that term is surrendered and gone.

Bequest of tithes revoked by renewal.

The distinction suggested by his Lordship between a devise of the lease and of the property has been since overruled; and it is now clear, that renewal will revoke as well where the bequest is of the *corpus, i. e.* of a house or close, as where it is of the *interest, i. e.* of a lease or term. Thus, in *Rudstone* v. *Anderson*, 2 Ves. sen. 418, where a testatrix devised all her lands, tenements, and hereditaments at W., and all her tithes and ecclesiastical dues payable out of W. aforesaid, or any other towns or places near the same: at the time of making the will, she was possessed of a lease of tithes at W., under the Archbishop of York: afterwards, the testatrix surrendered this lease, and took a new one, of which she was

possessed at the time of her death—Sir *John Strange*, M. R., thought that there was no real distinction between the words "all my tithes at W.," and if it had been "all my lease or interest in my lease at W.;" because both must refer to the interest she had at the time of making the will. Then, that interest did not remain at the death of the testatrix; for, by the surrender, she so far altered her interest, that what were her tithes under the lease at making the will could not be considered under the foot of this clause as being the same at the time of her death; but she acquired a new estate in them to commence at and run out to a different period of time; consequently, the tithes did not pass.

Again, in *Hone* v. *Medcraft*, 1 B. C. C. 261, where S., by his will, gave and devised unto B. the perpetual advowson and disposal of the living or rectory of W., for ever, together with the tithes of all sorts thereof. The rectory of W. was held by the testator by lease from New College, Oxford, for the term of ten years. After the execution of the will, the testator surrendered up that lease, and took a new lease from the college for ten years more. Lord *Thurlow* held, that the renewed term did not pass by the bequest, observing, that he had looked over all the cases, and must contradict them all if he did not construe the devise of the lease which was afterwards surrendered to be a lapsed (*qu.* revoked) devise.

Bequest of leaseholds at C. revoked by renewal.

So, where a testator, having a renewable lease for twenty-one years, from the prebendary of the prebend of Caddington Major, by his will devised *all his leasehold estates in the parish of Caddington*, charged with an annuity, and subsequently renewed the lease, such renewal was admitted to be a revocation, the principal question discussed being, whether a codicil, made by the testator subsequently to the renewal, was a republication, which was decided in the affirmative. *Coppin* v. *Fernyhough*, 2 B. C. C. 291.

Bequest by equitable owner of lease, and all profits, &c. held to carry right of renewal.

But, where it may be fairly inferred from the terms of the bequest, or the context of the will, that the testator intended the right of renewal to pass as an accessory to the immediate subject, the construction will be governed by this apparent intention. Thus, where a testator, who was possessed of the equitable interest of a prebendal lease, by his will declared that his eldest son, T., should have the disposal of the lease of his prebend of T., and that he should receive to himself *all the profits and advantages arising and accruing from it* (*a*); Lord *Hardwicke* was of opinion that the words were sufficient to pass the interest of the renewed lease, more especially as the testator had the equitable interest and not the legal estate. *Carte* v. *Carte*, 3 Atk. 174. In a more recent case, a testator, who was, by his marriage settlement, under an obligation to renew the lease of certain property which had been there settled, and the beneficial interest whereof was, in default of issue of the marriage, vested in himself, by his

(*a*) But might not these words have been satisfied by being applied to the existing lease?

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will, describing it as his manor, &c. in L., held by lease from the Dean and Chapter of Windsor, bequeathed the property to the trustees of his marriage settlement, upon certain trusts, including, among others, a trust to perform the covenants contained as well in the then lease *as in any future leases thereafter to be obtained.* Lord *Eldon*, affirming a decree of Sir *J. Leach*, V. C., was of opinion, that, regard being had to the language of the settlement and will, the testator must be considered as dealing with his whole interest, and the obligations which existed, and that the devise passed all future renewals, as well as the term which then subsisted. *Colegrave* v. *Manby*, 2 Russ. 238. See also S. C. 6 Madd. 72.

Remarks upon *Colegrave* v. *Manby*.

It appears, by the report of the Vice Chancellor's judgment, that the learned judge was inclined to fall in with Lord *Hardwicke's* idea in *Carte* v. *Carte*, 3 Atk. 174, that a bequest of the testator's interest in leaseholds referred to his interest at the time of his decease; but Lord *Eldon*, though he affirmed his Honor's decree, lent no countenance to any such doctrine, which, moreover, is completely contradicted by the case of *Slatter* v. *Noton*, 16 Ves. 197, where a bequest by a lessee of her dwelling-house, *and all her estate, term, and interest therein*, was held not to include a term for years subsequently acquired by the renewal of the lease. Sir *W. Grant*, who decided this case, was, at one period, even disposed to carry the doctrine to a greater, and, according to high authority, an indefensible extent; his Honor having decided that a bequest of leaseholds "for all the residue of the term and interest I shall have to come therein at my decease," merely referred to the residue which might, at the testator's decease, happen to be unexpired of the term which existed at the making of the will, and not to an interest subsequently acquired by renewal. But Lord *Eldon*, on appeal, reversed his Honor's decree, on the ground that the words were clearly sufficient to pass the interest the testator should have at his decease. *James* v. *Dean*, 15 Ves. 236.

Words descriptive of testator's estate and interest, referred to existing lease.

What expression will comprise the term existing at the testator's death.

The principle of Lord *Eldon's* reversal agrees precisely with that of the recent decision in *Churchman* v. *Ireland*, 1 Russ. & M. 251, that a devise of all and singular the estate and effects, real and personal, "which I shall die possessed of," referred not merely to the lands then belonging to the testator of which he should die seised, (according to the construction in *Back* v. *Kett*, Jac. 534), but was intended to embrace all property which the testator might acquire after the execution of his will. See also *Thellusson* v. *Woodford*, 13 Ves. 209, S. C. 1 Dow, 249.

Residuary bequest will pass after-acquired leaseholds.

Where a specific bequest of leaseholds is revoked by renewal, they fall to the residuary legatee, whose title to the residue, including as well what eventually becomes residue by the lapse or ademption of specific bequests or otherwise, as what originally composed it, is wholly unaffected by any changes which the property may have undergone in the testator's lifetime. *Stirling* v. *Lydiard*, 3 Atk. 199. See also *Digby* v. *Legard*, Dick. 500. Such a bequest would also operate on a leasehold for lives, renewed after the making of the will, if it were made transmissible to the

executors or administrators of the testator, and such clearly would be its course of devolution, unless there were, in the last conveyance, words of limitation, giving it a contrary destination. *Ripley* v. *Waterworth*, 7 Ves. 425. Where the heir is special occupant, his title cannot be defeated by *any* devise, particular or residuary, in an *antecedent* will. *Digby* v. *Legard*, 2 Dick. 500.

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A devise of real estate may be revoked by a conveyance made subsequently to the will, though, by the limitations or effect of such conveyance, the property is instantly revested in the testator. Thus, if A., being seised in fee of Whiteacre devises such land by name, or all his lands generally, to B., in fee, and afterwards, by lease and release, bargain and sale, or any other assurance, conveys Whiteacre to the use of himself for life, remainder to his wife for life, remainder to his own right heirs, the devise of Whiteacre will be revoked. *Burgoine* v. *Fox*, 1 Atk. 575.

—Conveyance under which the property is revested in the testator.

So, where the testator, being seised for life of lands, with remainder to trustees to preserve, with remainder to his first and other sons in tail, with remainder to himself in fee, suffered a common recovery, the use whereof was declared to be to himself in fee, such recovery was held to have revoked a previous will of the recoveree devising the lands in question. *Darley* v. *Darley*, 3 Wils. 6, Amb. 653, S. C. *nom. Darley* v. *Langworthy*, 3 B. P. C. Toml. ed. 359; *Bennett* v. *Wade*, 2 Atk. 325; *Harmood* v. *Oglander*, 8 Ves. 106.

Revocation by a common recovery.

It will be perceived, that, in both the preceding examples, the testator, under the limitations of the conveyance, was *in* of his old estate; hence it is obvious that the revocation is not produced by any change which it effects in the nature of the testator's estate, but is simply consequential on the momentary interruption of the testator's seisin. (See also *Sparrow* v. *Hardcastle*, 3 Atk. 799.; S. C. 7 D. & E. 416, n.) But, where such interruption takes place, not by the act of the testator himself, but by the tortious act of a stranger, the devise is not affected. As, where a testator is disseised subsequently to the making of his will, and re-enters, the entry restores the original seisin; and, by relation, the disseisee is considered to have been seised *ab initio*, so that his devise remains unrevoked. *Bunter* v. *Coke*, 1 Salk. 237; *Attorney-General* v. *Vigor*, 8 Ves. 282.

Principle of the cases.

Disseisin does not revoke, when.

But, if the disseisee were out of possession at the time of the making of the will, or at the death, the devise would be inoperative.

So, where a man makes his will, devising lands, and then exchanges those lands for others and dies, if the exchange is vacated subsequently to the testator's death, in consequence of a defect in the title, or in the aliening capacity of the other party, this does not restore the operation of the devise. *Attorney-General* v. *Vigor*, 8 Ves. 256.

Exchange.

Returning, however, to the cases of revocation by a new limitation of the devised estate, it is to be observed, that, as equity follows the law, the devise of an equitable interest will be revoked by a conveyance similar to

Doctrine in relation to equitable interests.

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that which would have revoked a devise at law. And, therefore, where a testator, who had the equity of redemption in certain lands, devised them, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs until the intended marriage, and, after such marriage, to other uses, though the marriage never took effect, yet the devise was held to be revoked. *Earl of Lincoln's case*, Show. Parl. Ca. 154; 1 Eq. Ca. Ab. 411, pl. 11. See also *Pollen* v. *Huband*, 1 Eq. Ca. Ab. 412, S. C. 7 B. P. C. Toml. ed. 433.

Effect of conveyance for a partial purpose.

The preceding cases shew that a devise will be revoked by a conveyance, of which the operation is nothing more than to revest the estate in the testator. And the same doctrine extends (though certainly with some rather considerable exceptions) to conveyances for partial purposes. Thus, if a testator, in order to secure a jointure rent to an intended wife, limits the devised lands to trustees for a term, and then goes on to limit the fee to himself, the latter limitation, (or rather the conveyance in fee which contains it), though altogether unnecessary for his purpose, will revoke the devise. *Goodtitle* v. *Otway*, 2 H. Blackst. 516, 1 Bos. & Pull. 576, 7 D. & E. 399, 2 Ves. jun. 604, n. S. C.; *Cave* v. *Holford*, 3 Ves. 650, 7 B. P. C. 593, Toml. ed. See also *Vawser* v. *Jeffery*, 16 Ves. 519, S. C. 2 Swanst. 268.

—In regard to copyholds.

This doctrine, however, does not apply to copyholds, the surrender of which to uses, creating particular estates only, (the ultimate limitation being to the use of the surrenderor himself), does not revoke a prior devise in regard to the reversionary inheritance included in such ultimate limitation. Thus, where A., who was seised in fee of freehold and copyhold estates, devised them by his will, and subsequently conveyed the freeholds to the use of himself for life, with remainder to the intent that B., his intended wife, should receive an annuity of 300*l.* for her life, by way of jointure, and subject thereto to trustees for ninety-nine years, upon trusts for securing the jointure, and subject thereto to the use of A., his heirs and assigns for ever. At the same time, the testator surrendered his copyhold lands to the same uses; and it was held, that the devise (though clearly revoked as to the freeholds by the conveyance of them) was not, as to the copyholds, affected by the surrender beyond the particular estates; on the ground that, according to the doctrine of the case of *Thrustout* v. *Cunningham*, 2 Black. 1046, S. C. Fea. C. R. 68, the fee simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance to the use of himself. *Vawser* v. *Jeffery*, 3 Barn. & Ald. 462. See also S. C. in Equity, 3 Russ. 479.

Partition does not revoke.

And even, in regard to freeholds, the rule that a conveyance of the fee for a partial purpose produces revocation, admits of two very important exceptions. The first is in the case of a partition between tenants in common, or co-heirs, which, by whatever kind of assurance effected, will not revoke a previous devise, provided the conveyance be confined to the

mere object of the partition, *i. e.* provided it assures to the testator, in the allotted lands, an estate precisely correspondent with that which he had in his undivided share. *Luther* v. *Kirby*, 8 Vin. Ab. 148, pl. 30 (*a*), S. C. cit. 3 P. W. 170; *Riley* v. *Baltinglass*, Sir T. Raym. 240; *Webb* v. *Temple*, 1 Freem. 542.

Mortgages revoke *pro tanto* only.

The other and well known exception is, where a testator, subsequently to his will, makes a mortgage of the devised lands, which, it is familiarly said, revokes the will in equity *pro tanto* only. *Hall* v. *Dunch*, 2 Ch. Rep. 154; *Perkins* v. *Walker*, 1 Vern. 97. To designate a mortgage a *pro tanto* revocation, however, is very inaccurate, and tends to create an erroneous impression of its actual effect on the rights of the parties claiming under the testator; for the phrase might seem to import that the transaction is viewed in the light of a deliberate retraction by the testator of his bounty to the extent of the mortgage, in which case the devisee would take the property *cum onere*, as against not only the mortgagee, but also the testator's own representatives, in the same manner as if the testator had created the charge by his will; but so far is this from being the case, that the devisee is clearly entitled to have the estate disincumbered out of the personal estate of the testator not specifically bequeathed. *Warner* v. *Hawes*, 3 B. P. C. Toml. ed. 21. It is obviously a perversion of language, therefore, to call a mortgage a revocation *pro tanto*. In short, the term is very inaptly applied in any of these cases in which the devise is defeated by the testator's subsequent conveyance of the devised property, which are all examples of ademption rather than of revocation.

Circumstances not varying the rule as to mortgages.

It is quite immaterial whether the testator has the legal estate or is equitable owner only; see *Tucker* v. *Thurstan*, 17 Ves. 131; whether the mortgage is created by fine or any other assurance; *Rider* v. *Wager*, 2 P. W. 334; *Jackson* v. *Parker*, Amb. 687; that it contains a power of sale; *Ogle* v. *Cook*, cit. 3 Atk. 746: see also *Vernon* v. *Jones*, Pre. Cha. 32, 2 Vern. 241, 1 Eq. Ca. Ab. 410, pl. 10, 2 Freem. 117, S. C.; see also *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685; which power is accompanied by a declaration that the surplus of the monies arising from the sale shall be personal estate of the testator; *Hodges* v. *Green*, 4 Russ. 28; or, lastly, whether the mortgage be made to the devisee himself, or to a stranger. *Peach* v. *Phillips*, Dick. 538; *Baxter* v. *Dyer*, 5 Ves. 656, overruling *Harkness* v. *Bayley*, Pre. Cha. 514. In all these instances, the conveyance does not affect the devise farther than by giv-

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(*a*) In this case A. and B. were tenants in common in fee. A devised his moiety. A partition then took place, and a fine was levied, the uses whereof were declared as to the entirety of part to A. in fee, and of the residue to B. in fee. The devise remained unrevoked.

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ing to the mortgage creditor a claim to be satisfied his debt out of the devised estate.

Conveyance in trust for sale.

And a conveyance in trust to sell for the payment of debts generally, is no less inoperative to vacate a previous devise of the property so conveyed, than a simple mortgage for a definite sum lent. *Vernon* v. *Jones*, 2 Vern. 241. See also *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685.

Bankruptcy.

And the same has been decided in regard to bankruptcy, which subjects the testator's property at large to a similar course of application. *Charman* v. *Charman*, 14 Ves. 580.

Mortgage for a term.

Mortgages by demise, of course, do not, even at law, produce revocation *ultrà* the estate to which they extend. Thus, where a testator, after devising freehold lands in strict settlement, demises them, by way of mortgage, for one thousand years, the inheritance, out of which the term has been carved, still passes by the devise, precisely in the same manner as where a testator, subsequently to his will, grants a short lease at rack rent of the devised property; *Hodgkinson* v. *Wood*, Cro. Car. 23; for, the same principle obtains whether the term be for one thousand years or seven.

Lease at rack rent no revocation of an annuity devised out of the property.

Where a testator, by his will, charges lands with an annuity, and afterwards, in his lifetime, demises those lands at a rack rent, the lease does not revoke the annuity, and the annuitant will be entitled to have the rent, or an adequate portion of it, applied in satisfaction of his demand; *Parker* v. *Lamb*, 3 B. P. C. 12, Toml. ed.; but he would have no power of distress as against the lessee. In such a case, therefore, a term should be devised to a trustee for the purpose of securing the annuity, which would entitle the devisee in trust to receive, as incidental to the reversion, the rent reserved by the lease. *Parker* v. *Lamb*, 3 B. P. C. Toml. ed. 12 (*a*).

Partition or mortgage deed, having an ulterior purpose, revokes.

If the partition, or mortgage deed, does not stop with merely effecting the partition or mortgage, but modifies the ulterior ownership, it revokes the devise. As, where, by a deed of partition between two co-heirs of gavelkind lands, (one of whom had previously made a will devising his share), the lands allotted to the testator were limited to such uses as he should, by deed or will, appoint, and, in default of appointment, to him in fee; it was held, that, by this new limitation of the use, the previous devise of the property was revoked. *Tickner* v. *Tickner*, cit. 1 Wils. 309, and 3 Atk. 742, 745, 750. So, where A., being owner in fee of fee farm rents, subject to certain marriage articles, whereby he had agreed to settle them in strict settlement, with reversion to himself in fee, made his will, by which he devised the rents; and, subsequently, on borrowing 5,500*l.* from B., by lease and release, for securing the repayment, and barring

(*a*) The contrary of this might be inferred from the reporter's marginal epitome of the case, which is also inaccurate in numerous other instances.

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all estates tail, &c. conveyed the fee farm rents in question to C., his heirs and assigns, to the intent that a common recovery might be suffered; and it was declared that such recovery should enure to the use of B. (the mortgagee) for one thousand years, subject to redemption, remainder to the testator for life, with remainder to F., his wife, for life, with remainder to himself in fee. The recovery (which it will be seen was altogether unnecessary) was never suffered; but Sir *R. P. Arden*, M. R., and afterwards Lord *Eldon*, on appeal, expressed a decided opinion that the devise was revoked, the testator having subjected the property to ulterior limitations, beyond the purpose of a mere mortgage; and considering, his Lordship observed, in reference to the authorities, "how very little, in addition to that mere purpose, will revoke." *Harmood* v. *Oglander*, 6 Ves. 199, S. C. 8 Ves. 166.

It is clear that, if the limitations in this case had been simply to the mortgagee for the term, and, subject thereto, to the mortgagor himself in fee, the will would have been revoked, precisely as if, *without any mortgage, the fee had been so limited.*

Again, in a recent case, where a testator, seised in fee, conveyed certain real estates to trustees, upon trust, by sale or mortgage, to raise certain mortgage and other debts, and the trustees were to stand possessed of the surplus, in trust for the grantor, his executors and administrators, as personal estate; and it was provided, that, until a sale, the trustees should apply the rents in payment, first, of the interest on a mortgage, and, secondly, *of an annuity to the grantor's wife for her separate use*— Sir *J. Leach*, M. R., held that the will was revoked, not (as had been contended) on account of the direction that the residue of the monies arising from the sale should be personal estate, which did not vary the operation of the deed, but on account of the annuity, which might continue after the testator's death. *Hodges* v. *Green*, 4 Russ. 28.

What words in the proviso for redemption will render a mortgage revocatory.

What words introduced into the proviso for redemption indicate an intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases, certainly, authorize the conclusion that such an intention will not be inferred from loose expressions affording conjecture merely, but it must be explicitly and unequivocally declared that the estate is to be reconveyed to uses different from those which previously existed, a doctrine which seems to agree with the well known rule, establishing that the interests of a husband and wife, joining in a mortgage of her property, are not varied by ambiguous expressions thrown into the proviso for redemption. (*Vide ante*, Vol. 5, p. 278). Thus, where A., subsequently to his will, by a conveyance, by way of security, in consideration of 800*l.* advanced by B., conveyed lands to trustees in fee, upon trust to permit him to enjoy until default of payment; and, upon payment of principal and interest, upon trust, to re-convey unto and to the use of the testator, his heirs and as-

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signs, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents, and purposes, as A., his heirs or assigns, by any deed or deeds, instrument or instruments in writing, under his or their hand or respective hands, should direct, limit, or appoint; and that clear of and from all intermediate charges and incumbrances whatever; and, in default of payment, the trustees were empowered to sell. Sir *J. Leach*, V. C., held, that this was a revocation *pro tanto* only. "The true question," his Honor observed, "is, whether, by the addition of the words which follow the direction to re-convey to the devisor and his heirs, he does, in fact, acquire any new estate or power; or, where these subsequent words do not leave him with the same estate and the same powers as he would have had if they had not been used. It is plain, that he who has a right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, and for any estates and interests, at his pleasure. The authority to make such direction by any deed or instrument under his hand is the necessary consequence of this conversion of his legal estate into an equitable interest; and the subsequent words are the mere '*expressio eorum quæ tacitè insunt.*' I am of opinion, therefore, that the conveyance in question, being by way of security for money, is a revocation *pro tanto* only. I am unable to say whether this opinion does or does not interfere with the case of *Kenyon* v. *Sutton*, for want of knowing accurately the facts of that case; but it certainly does not interfere with the case of *Tickner* v. *Tickner*, where a new power to appoint to uses was acquired." *Brain* v. *Brain*, 6 Madd. 221.

The case of *Kenyon* v. *Sutton*, referred to by the Vice Chancellor, is a decision of Lord *Alvanley* when at the Rolls; and appears, by that learned Judge's own brief statement of it, in *Williams* v. *Owens*, 2 Ves. jun. 600, to have been simply this:—A., who was seised in fee of the property in question, after devising it by his will, executed a conveyance in trust for the payment of debts, in which it was declared, that, after payment of the debts, the trustees should convey to such uses as A., by deed or will, should appoint; and, for default of appointment, to him in fee: the Master of the Rolls held the devise to be revoked.

Mere acquisition of legal estate, no revocation.

Though an absolute conveyance by an equitable owner will revoke a prior devise, by analogy to the rule which makes a similar alteration of estate a revocation at law, yet, when the testator merely clothes his equitable title with the legal estate, by taking a conveyance to himself; this transaction, since it produces no change in the beneficial ownership, which is the subject of the devise, leaves that devise unrevoked. See *Parsons* v. *Freeman*, 3 Atk. 749; *Dingwell* v. *Askew*, 1 Cox, 427.

If, therefore, a testator contracts for the purchase of land, by which he becomes equitable owner in fee, then devises it by his will, and subsequently procures the land so purchased to be conveyed to him simply in

fee, the equitable interest acquired by the contract will still pass by the devise, and the heir-at-law, to whom descends the legal inheritance afterwards conveyed, will be a trustee for the devisee. *Fullarton* v. *Watts*, cit. Doug. 691. If, however, the conveyance goes beyond the mere transfer of the legal title to the equitable owner, and newly modifies the property, revocation will, of course, be produced, as it would if the equitable interest separately had been so modified. Thus, if a testator, after having contracted to purchase lands, and devised them, causes the conveyance to be made to the usual uses to prevent dower, viz. to such uses as he shall appoint, and, in default, to the use of himself for life, with remainder to a trustee for himself during life, with remainder to him (the purchaser) in fee, the devise will be revoked. *Rawlins* v. *Burgis*, 2 Ves. & Bea. 382. And the same effect is produced where the conveyance is simply to such uses as the devisor shall appoint, and in default of appointment to him in fee. *Tickner* v. *Tickner*, cit. 1 Wils, 311, S. C. 3 Atk. 742; *Parsons* v. *Freeman*, 3 Atk. 741.

Where conveyance to purchaser revokes will made after contract.

Of course, if the conveyance is to a trustee for the purchaser, the devise is not affected; its only operation being to transfer the legal estate from the vendor or his trustee to the purchaser's nominee. *Fullarton* v. *Watts*, Doug. 691; *secus*, where (according to the old inefficient mode of excluding dower) the legal inheritance is limited to the purchaser and a trustee jointly, which alters the quality of the estate. *Ward* v. *Moore*, 4 Madd. 368.

If the contract points out the nature of the limitations which are afterwards inserted in the conveyance, it is clear that such conveyance, operating as it then does only to turn the equitable into legal estates, will not revoke the will, but it may admit of doubt whether the mere stipulation that the estate shall be conveyed to the purchaser in fee, *or to such other uses as he shall direct*, would prevent a conveyance to the ordinary uses to prevent dower from producing revocation; for, as words to this effect, where inserted in a proviso for redemption in a mortgage, are merely equivalent to a direction to convey to the mortgagor in fee, (*vide ante*, p. 123), it seems difficult, consistently, to ascribe to them greater potency in a contract.

The same general doctrines are applicable in regard to equitable interests created by marriage articles as to those which are derived from contracts for purchase. The revoking effect of a conveyance made under the articles, upon a will disposing of the equitable interest derived under the articles, depends entirely upon the fact, whether the conveyance is a mere execution of the articles which created the equitable interest in question, or newly modifies the ownership. *Parsons* v. *Freeman*, 3 Atk. 741; *Brydges* v. *Duke of Chandos*, 2 Ves. jun. 417, S. C. in Dom. Proc. 7 B. P. C. Toml. ed. 382.

As to equitable interests created by marriage articles.

But, it is to be observed, that where, by the articles, the intended settlor covenants to convey the lands to certain uses, and, subject thereto,

Effect where the ultimate fee

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is to be conveyed to the covenantor himself.

to the use of himself in fee, this does not sever the equitable from the legal ownership in regard to such ultimate fee, so as to support a devise made intermediately between the articles and the conveyance, since such severance could only be produced through the medium of an obligation attaching on the covenantor to convey the reversion in fee to himself, and there seems to be no title in any third person to call for such a conveyance; for one cannot have a legal estate in trust for oneself. Influenced, it seems, by considerations such as these, Lord *Eldon*, in *Harmood* v. *Oglander*, 8 Ves. 127, overruled the case of *Williams* v. *Owens*, 2 Ves. jun. 595, where the contrary doctrine was advanced by Sir *R. P. Arden*, who appears to have confounded the case of a covenant to convey with that of an actual conveyance, by means of which, of course, the grantor may effect a severance of the legal and equitable ownership, by vesting the legal inheritance in a trustee for himself. The learned judge entertained the notion, that the articles imposed on the covenantor an obligation to convey the fee, which fully accounts for (and had it been correct, would have justified) the conclusion at which he arrived. The argument upon which Lord *Eldon* impugned the case of *Williams* v. *Owens*, would seem to involve the conclusion, that an agreement by a testator to convey an estate in fee to himself, would, for every purpose, be null and void: but the principle has not been followed up to this extent; for, in the case of *Vawser* v. *Jeffery*, 16 Ves. 519, S. C. 2 Swans. 268, Sir *W. Grant* and Lord *Eldon* successively maintained the doctrine, that, if a surrender of copyholds to certain limitations (which have been already stated, *vide ante*, p. 120), would have revoked the will at law, the covenant to make such surrender revoked it in equity. And, though the assumption upon which this position was based, namely, that the surrender, if made pursuant to the covenant, would have been a revocation at law, was, in the subsequent stages of that case, decided to be unfounded; yet this circumstance does not necessarily affect the doctrine in question. There is some difference, however, in the line of reasoning pursued by these great contemporary judges. Sir *W. Grant*, adopting the notion of his predecessor, held, that the covenantor was bound to convey the fee simple to himself, according to his covenant. While, on the other hand, Lord *Eldon* puts the doctrine rather upon the ground of intention. "It is contended," his Lordship observed, "that, if the widow had applied to this Court to have the covenant executed, the Court need not have directed any such acts as would raise this question. My present opinion is, that I must consider the testator to have died with the intention which he expresses in this covenant, unless it can be shewn that he intended otherwise to execute his purpose of providing a jointure." Lord *Eldon's* observations shew that he considered the case as allied in principle to those (presently noticed) in which an ineffectual attempt to convey the devised lands has been held to revoke; though this view of it entirely differs from that of the Court of King's Bench, in the

Conflicting opinions as to the revoking effect of a void covenant.

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case of *Wright* v. *Littler*, 3 Burr. 1244, S. C. 1 Blackst. 345, who thought that a void deed of covenant was not a revocation, as it was not binding on the testator, and expressed no intention to make a present disposition. And, Lord *Mansfield* expressly lays it down, that covenants have never been allowed to be a revocation, unless where the covenantee has a right to specific performance—a principle which it seems very difficult to refute. In that case, however, the instrument in question was not a deed of covenant, but an unsealed paper, by which the testator "covenanted and agreed" that the lands in question should go and be given to certain persons, and the question was, whether it was testamentary: the Court decided in the negative, and that the paper was not a revocation of a previous will.

At all events, it is clear that a covenant to execute a conveyance, which, if made, would not revoke the will at law, will be inoperative to revoke it in equity. *Vawser* v. *Jeffery*, 3 Russ. 479.

Revoking effect of a contract for sale.

Another and an obvious case of the revocation in equity of a devise of lands, occurs where the testator contracts for the sale of them; *Mayer* v. *Gowland*, Dick. 563; such a contract, if originally binding on the testator, will revoke the devise, though it should happen to be rescinded subsequently to his decease; and also, by the better opinion, even though it should be rescinded antecedently to that event. See *Knollys* v. *Alcock*, 7 Ves. 558; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170. The legal estate passes under the devise, and the devisee is bound to carry the testator's contract into effect, by conveying the estate to the purchaser. If the devise, which might thus operate upon the legal inheritance, would have the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations in favour of minors or unborn persons, the testator should, immediately after entering into the contract, execute a codicil vesting the property in trustees for the purpose of carrying the contract into effect.

Suggestion.

—of marriage articles.

Articles supported by the valuable consideration of marriage clearly have the same revoking effect in equity upon a previous devise of the property agreed to be settled, as a contract to sell. See *Cotter* v. *Layer*, 2 P. W. 624; *Vawser* v. *Jeffery*, 16 Ves. 519, S. C. 2 Swanst. 268.

Suggestion where one of the devised shares is afterwards settled on the devisee.

Another point proper to be noticed is, that, where a testator, who has devised his real estate among his children in undivided shares, afterwards, upon the marriage of one of them, conveys or covenants to convey to uses, for the benefit of that child, an aliquot share, equal to that which he had devised to him or her, (no doubt intending to substitute it for the share so devised), such settlement or covenant does not revoke the devise of that entire share, there being nothing to connect or identify it with the settled share; but it revokes the devise of all the shares *pro tanto*, letting in the advanced child to participate equally with the others in the remaining shares not affected by the settlement. Thus, where a testa-

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tor by his will gave one moiety of his real and personal estate to his elder daughter, and the other moiety to the younger daughter, and afterwards, upon the marriage of the elder with A., covenanted to settle one moiety of all his real estate to the use of himself for life, with remainder to A. and his intended wife for their lives, remainder to the younger children of the marriage in tail, remainder to A. in fee, it was held that this covenant revoked the will in equity as to one moiety of the testator's real estate, and that the other moiety passed under the devise in the will to the two daughters, and which was thought to be rendered still more clear by the republishing effect of a codicil executed after the articles. *Rider* v. *Wager*, 2 P. W. 334.

4. *Revocation by a void Conveyance.*

Revoking effect of void deeds of conveyance.

Sometimes an instrument, designed as a conveyance, but incapable of taking effect as such, operates, nevertheless, to revoke a previous devise. Such is the rule where the failure of the conveyance arises from either the incapacity of the grantee, or the want of some ceremony which is essential to the efficacy of the instrument. Thus, in the case of *Beard* v. *Beard*, 3 Atk. 72, Lord *Hardwicke* decided that a deed of gift by the testator to his wife of personal estate which he had previously bequeathed by his will, revoked the bequest, though the deed was inoperative under the rule of the common law, which incapacitates the wife from taking property by way of gift from her husband. So, it has been often ruled, from a very early period, that a feoffment without livery of seisin and a bargain and sale without inrolment, will operate as a revocation of a previous devise of the lands thus ineffectually attempted to be aliened. See *Montague* v. *Jeffries*, Moor. 429, pl. 599; 1 Roll. Ab. 615, pl. 6, 7, S. C. See also 3 Atk. 73; 1 Blackst. 349; 2 Swanst. 274. And the rule has been considered as applying to a common recovery, rendered void by the misnomer of the tenant to the præcipe, *Doe* v. *Bishop of Landaff*, 2 Bos. & Pull. New Rep. 491, and to an instrument purporting to be an appointment under a power which at the time was not in the testator. *Shove* v. *Pinke*, 5 Durn. & E. 124, 310. In this case, indeed, it was thought that the instrument, if void as an appointment, might take effect as a grant of the reversion; but Lord *Kenyon* unreservedly stated, that, "even supposing it was an inadequate conveyance for the purpose for which it was intended, still, if it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And in the more recent case of *Vawser* v. *Jeffery*, 2 Swanst. 274, Lord *Eldon* treated it as clear that an attempt by a testator to convey his copyhold estate by deed would revoke a previous devise of that estate.

As to conveyances void under stat. 9 Geo. 2, c. 26.

It has been held, however, that a conveyance to charitable uses, which was void by the stat. 9 Geo. 2, c. 26, on account of the grantor dying within twelve months after its execution, did not affect a prior devise, on

the ground, it is presumed, (for the reasons are not stated), that the event of the grantor surviving the year was an implied condition annexed to the deed, the effect being the same as if he had expressly made his conveyance dependent on such a contingency. *Matthews* v. *Venables*, 9 Moore, 286, S. C. 2 Bing. 136.

Deeds by *femes covert* revoke wills underpowers, when.

So, it has been decided, that a deed, executed by one who is under a personal incapacity to make the attempted disposition, has no effect in revoking a prior will; for, as the principle proceeds upon *intention*, a power to perform the act seems to be a necessary ingredient. Thus, where a *feme covert*, who had a power to appoint by will only, and had also the fee in default of appointment, made a will in pursuance of the power, and subsequently executed a deed professing to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment. *Eilbeck* v. *Wood*, 1 Russ. 564. But, if a *feme covert*, who has a power of appointing by deed or will, makes a will in exercise thereof, and afterwards, by deed, in execution of her alternative power, directs her trustees to convey to her, which they accordingly do, of course the testamentary appointment is revoked. *Lawrence* v. *Wallis*, 2 B. C. C. 319.

Revoking effect of fraudulent deeds.

It seems clear, that a conveyance, which is void at law on account of fraud or covin, is not a revocation; but a different rule was formerly considered to apply in regard to deeds which are valid at law, though impeachable in equity. This distinction was laid down by Lord *Hardwicke*, in the case of *Hick* v. *Mors*, Amb. 215, where a conveyance having been improperly obtained by an attorney from a sailor named Baldwin, his Lordship was of opinion that it revoked a previous devise of the property by the latter, observing—"There is no doubt at law but that it is a revocation which depends upon intention; therefore, an imperfect conveyance is a revocation. Intent does not mean an intent to revoke, but to make a different disposition; so, a conveyance intended to strengthen the will, operates as a revocation. Baldwin meant to make a conveyance. *This is not like the case of a conveyance by covin, which would make it not his deed at law; that would be a nullity:* but here the whole passed, and could not be reinvested without a conveyance." But this distinction was disregarded in the subsequent case of *Hawes* v. *Wyatt*, 2 Cox, 263, S. C. 3 B. C. C. 156; where a deed, which the Court of Chancery decreed to be delivered up, as having been obtained by an oppressive exercise of the parental authority, was held by Lord *Thurlow*, reversing a decree of Sir *R. P. Arden*, M. R., not to be a revocation, on the ground that the Court, by ordering the deed to be delivered up, declared it to be no deed, and, therefore, it could not be a revocation. The Master of the Rolls appears, by his observations in the case of *Ex parte Earl of Ilchester*, 7 Ves. 374, when Lord Chief Justice of the Court of Common Pleas, not to have been convinced by the reasoning of Lord *Thurlow*, before whom he said the case of *Hick* v. *Mors* was not adverted to; and Lord *Eldon*, in the

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case of *Attorney-General* v. *Vigor*, 8 Ves. 283, intimated that the cases of *Hick* v. *Mors* and *Hawes* v. *Wyatt* were contradictory; and that, until *Hawes* v. *Wyatt*, he had considered that there was a difference between deeds void at law and in equity; and his Lordship observed, that, if that case were right, "it must be supported upon this principle, *if any*, that where a man is induced by fraud, this Court considers him as having no will. He is compelled by fraud, as much as partition (which, it will be recollected, is not a revocation even at law) is compelled by the writ." The reader will probably see, in these strictures on Lord *Thurlow's* decision, ground for withholding his unreserved confidence in that decision.

5. *Revocation by a subsequent revoking or inconsistent Will or Codicil.*

In considering this head of revocation, wills of freehold and personal estate must be distinguished. The difference between them has been created by the statute of frauds, 29 Car. 2, c. 3, s. 6, which enacts, "that no devise in writing of *lands, tenements, or hereditaments*, nor any clause thereof, shall be revocable, "otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

Stat. 29 Car. 2, c. 3, s. 6.

Devises of lands, how to be revoked.

The same statute, sect. 22, provides, "That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest, therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

Bequests of personalty how to be revoked.

Unless these enactments had placed the revocation of wills under positive restrictions, they might still have been revoked as before the statute, notwithstanding the solemnities imposed by it on their execution; since there is no necessary implication that what is required to the execution of an instrument is essential to its revocation. Hence, before the statute of frauds, it was held that a will required to be in writing by the statute of 34 Hen. 8, c. 5, might be revoked by parol; *Cranvel* v. *Sanders*, Cro. Jac. 497; and it has been decided, that a testamentary appointment of guardians, for which two attesting witnesses are required by the statute of 12 Car. 2, c. 14, s. 8, (*ante*, p. 4), may be revoked by an unattested will. *Ex parte Earl of Ilchester*, 7 Ves. 348. And, on the same principle, where

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a power requires a will to be executed and attested in a particular manner, it may be revoked by a will, sufficient by the general rule for the disposition of the property, though such will may be incapable of again disposing of it under the power. *Richardson* v. *Barry*, 3 Hagg. 249.

Difference between devising and revoking clauses.

Though the statute of frauds has required that a will, which revokes a devise of lands, should be attested by the same number of witnesses as a will devising them, yet, in some particulars, the formalities prescribed are different in the several instances. First, a devising will is required to be subscribed by the witnesses in the testator's presence, which a revoking instrument is not; and, secondly, a revoking instrument is required to be signed by the testator in the presence of the witnesses, while a devising will need not be signed in their presence; each, therefore, has a circumstance not applicable to them in common. This difference, however, which probably occurred without design, has been attended with very little practical result, for it seldom happens that an instrument is executed for the mere purpose of revoking a previous will; and, if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the two cases. If the devise, with which the clause in question is associated, be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation, so that the efficiency of the will, as a revoking instrument, cannot, in such a case, become a subject for consideration. If the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause will be inoperative on another principle, namely, that the revocation is dependent on and fails with the attempted new disposition, the purpose to revoke being considered to be not a substantive independent intention, but subservient to another purpose for which the instrument is incompetent, the testator meaning to do the one so far only as he effects the other. *Eggleston* v. *Speke*, Carth. 79, 1 Show. 89; *Onions* v. *Tyrer*, 2 Vern. 441, S. C. 1 P. W. 343. See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Kirke* v. *Kirke*, 4 Russ. 435. But see *Richardson* v. *Barry*, 3 Hagg. 249.

Revocation dependent on efficiency of substituted disposition.

But, it seems, that, if the second devise fails, not from the infirmity of the instrument but from the incapacity of the devisee, the prior devise will be revoked, notwithstanding that the gift intended to be substituted is of no effect. *Frenche's case*, 1 Roll. Ab. 614 (O), pl. 4; *Roper* v. *Constable*, 2 Eq. Ca. Ab. 359, pl. 9; S. C. *nom. Roper* v. *Radcliffe*, 5 B. P. C. Toml. ed. 360.

Revocation where devise intended to be substituted fails.

With respect to the revocation of wills of personal estate, it is to be observed that questions concerning it most commonly occur in the Ecclesiastical Courts; which, of course, no less than the temporal Courts, are bound by the 22nd section of the statute of frauds, excluding parol revocations. Accordingly, in a recent case, Sir *J. Nicholl* decided that

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evidence could not be received of the testator's intention, orally announced, to adopt the prior of two wills, both which were found at his decease uncancelled, though it appeared that most of the bequests in the posterior will had lapsed. *Daniel* v. *Nockolds*, 3 Hagg. 777. But the enactment in question is not considered to interfere with the reception of evidence of acts of a testator in his lifetime concerning his testamentary papers, still less does it exclude inquiry into the state in which such papers were found at his decease.

Probate how far conclusive.

Here it may not be much out of place to observe, that the granting of probate, which is the act of the Ecclesiastical Court, is conclusive as to the testamentary character of the instrument in relation to personal estate, but not with respect to real estate, either copyhold or freehold; for though (as shewn in a former section, *vide ante*, p. 86) any instrument sufficient as a will of personalty would be adequate to the devise of copyhold estates; yet, in regard to all persons other than those who claim the personal estate, the proceeding of the Spiritual Court is *res inter alios acta*. *Hume* v. *Rundell*, 6 Madd. 331. And, even with respect to personal estate, the granting probate of any paper has no other effect than to establish generally its claim to be received as testamentary, and it remains for the Temporal Courts (or the Spiritual Court in the exercise of a distinct branch of its jurisdiction,) to determine the construction. The adjudication of these Courts may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property, (see *Gawler* v. *Standerwick*, 2 Cox, 16), or to be in substance the same as another paper, of which probate has been granted. See *Heming* v. *Clutterbuck*, 1 Bligh, New Ser. 479. Where the paper of which probate is prayed professes to be an appointment under a power, the Prerogative Court applies to it the ordinary principles of testamentary law, without attempting, in that proceeding, to pronounce on its sufficiency as a due execution of the power under which it purports to be made. *Draper* v. *Hitch*, 1 Hagg. 674. See also *Stevens* v. *Bagwell*, 15 Ves. 139. The facility with which loose papers are proved in the Ecclesiastical Courts, has been sometimes complained of by Judges on whom the task of expounding the testamentary jargon thus transmitted has devolved; (see *Matthews* v. *Warner*, 4 Ves. 208, 210); in all probability, it has been induced by the consideration that a leaning on this side is less injurious than an error on the opposite side, the effect of which would be to debar parties from the farther litigation of their rights under the contested instrument (*a*).

As to completeness of revoking will.

Revocation often depends on the completeness of the posterior of two testamentary papers, in regard to which it may suffice to refer to what has been stated in a former section respecting the necessity of every intended

(*a*) As to the admissibility in evidence of paper-writings, not proved as testamentary, *vide* Doug. 707; 1 Cox, 1; 15 Ves. 153; 2 East, 548; 1 Russ. 266.

(though possibly in itself superfluous) solemnity of execution being perfected, (*ante*, p. 87), with the additional remark, that an unfinished paper has to struggle with an increased force of objection, where its operation would go to disturb the dispositions of a previous complete and duly executed will. See *Griffin* v. *Griffin*, 4 Ves. 197, n.

We proceed now to the consideration of the revoking *contents* of a subsequent will and codicil; and as, in this point of view, wills of freehold and personal estate are referable to the same general principles, the decisions respecting them have been blended. Of course, a mere intimation by a testator of his intention to make, by a future act, a new disposition, does not produce actual revocation. Thus, where A. made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A., having acquired other real property, made another will, whereby he devised the newly-acquired property, and then wrote as follows:—"As to the rest of my real and personal estate, I *intend* to dispose of the same by a codicil to this my will hereafter to be made;" it was contended, that this clause, though inoperative as a disposition, indicated an intention to revoke the will; but Lord *Ellenborough* and Mr. Justice *Lawrence* held that it was not a revocation. They considered the cases before the statute to be applicable; and that the testator merely intended to dispose of the subsequently-acquired real estate, and the property which had lapsed by the death of the residuary legatee; and that, even if this had imported an intent to revoke by making a *different* disposition in future, it would not, according to the authorities, have amounted to a revocation, unless the Court could ascertain what the difference was. *Thomas* v. *Evans*, 2 East, 488. See also *Griffin* v. *Griffin*, 4 Ves. 197, n. Nor is it sufficient, in order to revoke a will, that the existence of a subsequent will should have been found by a jury; it must be found to be different from the former; *Seymor* v. *Nosworthy*, Hard. 374, S. C. Show. P. C. 146; and even the latter finding will not avail, if it be added, that the nature of such difference is unknown to the jurors. *Goodright* v. *Harwood*, 3 Wils. 497; 2 Blackst. 937; Cowp. 87; 7 B. P. C. Toml. ed. 489.

Mere intention to revoke by a future act inoperative.

Where a testator at different periods of his life has made various testamentary papers, some of which he destroys and others he leaves undestroyed, each professing to contain his last will, this character belongs exclusively to such of the uncancelled papers as was executed most proximately to his decease; see *Goodright* v. *Glazier*, 4 Burr. 2512; *Harwood* v. *Goodright*, Cowp. 92; and in order to ascertain the time of the execution of the respective papers, recourse may be had to evidence drawn either from their own contents or from extrinsic sources. Sometimes the water-mark, shewing when the paper on which a will is written was manufactured, affords decisive proof of its posteriority to another will, the period of whose execution can be ascertained by some other means; I say by *other* means, because the date of the manufac-

Rule where several wills are subsisting at death.

REVOCATION.

ture of the paper, of course, only negatives its earlier origin, and does not prove its *priority* to any other paper.

Effect of contradictory wills of uncertain date.

If, from the absence of date, and of every other kind of evidence, it is impossible to ascertain the chronological relation of two wills, both are necessarily void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain. See *Phipps* v. *Earl of Anglesea*, 7 B. P. C. Toml. ed. 443. And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the Courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier, so far only as it is clearly incompatible with the later paper. *Weld* v. *Acton*, 2 Eq. Ca. Ab. 777, pl. 26.

The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior paper, however, exists only when the subsequent paper is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior paper would be to produce partial intestacy, or when the subsequent paper is styled a codicil; for the office of a codicil being to vary, and not wholly supplant a previous will, such a denomination of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained.

Questions often raised by codicils.

Numerous are the questions which have been raised in regard to the extent to which a codicil affects the dispositions of a will, or antecedent codicil, and which are often occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the will or previous codicil, forcibly suggesting, therefore, the propriety of never preparing a codicil without an actual inspection of the will or codicil whose operation it is designed to alter. All that can be attempted here is, to glance at a few points exemplifying the principles of construction which have obtained in these cases. A primary rule, obviously, is not to disturb the dispositions of the will, farther than is absolutely necessary for the purpose of giving effect to the codicil.

Thus, where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B. who should attain the age of twenty-one, and should assume the testator's name, the first devise would be revoked only *quoad* the interest comprised in the executory devise in the codicil; so that, until B. had a son who attained his majority, and assumed the testator's name, the property would pass to A. under the devise in the will. *Duffield* v. *Duffield*, 3 Bligh, New Ser. 261.

Will revoked by codicil *pro tanto* only.

So, where a testator devises lands to A., subject to a rent-charge to B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the rent, the latter remains a charge

on the land in the hands of the substituted devisee. *Beckett* v. *Harden*, 4 Mau. & Selw. 1.

The principle may be farther illustrated by the following cases. A testator devised his estates to C. B. for life *without impeachment of waste*, and by a codicil, directed his trustees to let, until tenant for life married, the leases to be *impeachable of waste*, and the rents to be accumulated and laid out in lands to be settled to the same uses: it was contended that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir *W. Grant*, M. R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life. *Lushington* v. *Boldero*, Geo. Coop. 216.

So, where a testator, by his will, bequeathed as follows—"As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the *residue* of his personal estate to A., and gave the same to B. It was held that the revocation was confined to the residue, and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c. *Clarke* v. *Butler*, 1 Mer. 304.

Estates A. and B. are devised to the same uses. Revocation as to A. does not affect B.

It may be observed, that, where a testator, to avoid unnecessary repetition, has by his will declared his intention respecting a property which he was then devising to be similar to what he had before expressed concerning another property antecedently given, and he afterwards, by a codicil or any other act, revokes his first gift, such revocation does not affect the second devise. Thus, where a testator, by his will annexed one estate to another, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and by an act in his lifetime he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will. *Darley* v. *Langworthy*, 3 B. P. C. Toml. ed. 359, reversing Lord *Camden's* decree in *Darley* v. *Darley*, Amb. 653; see also *Lord Sidney Beauclerk* v. *Mead*, 2 Atk. 167.

So, where a testator bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the residue; it was held that this was no revocation of the specific bequest. *Roach* v. *Haynes*, 6 Ves. 153.

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directs the produce to be applied upon the trusts thereinafter expressed concerning his residuary personal estate; he then bequeathed his residuary personal estate upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner—Sir *J.*

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Leach, M. R., held, that, by this alteration in the disposition of the personal estate, the devise of the realty was not affected, the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate; in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will would have been no revocation of the disposition of the produce of the freehold estate; and his Honor observed, it could make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents, and purposes, by compendious words of reference. *Francis* v. *Collier*, 4 Russ. 333.

Distinction where the first devise is modified only.

Where the devise of the principal estate is not simply revoked, but is modified, we are not too hastily to conclude that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the Master of the Rolls in the last case, might seem to conduct to such a conclusion; for, a different construction prevailed in the case of *Lord Carrington* v. *Payne*, 5 Ves. 404, where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate, to be laid out in land to be settled "*to such uses, and upon such trusts, &c. as he had declared concerning his real estate.*" By a codicil, he revoked so much of his will as directed the settlement of his estate to those limitations, and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir *R. P. Arden*, M. R., held, that the bequest of the personalty was not revoked. He considered, that, though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both properties); and it was no more than if the devisor had, with his own hand, inserted the name of one devisee before another.

Unless the case of *Lord Carrington* v. *Payne* can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

Absolute revocation held not to be restrained by recital.

Where a testator, in a codicil to his will, recites an inconvenient consequence to result from a devise in his will, as that, in a particular event, the devisee or legatee would be unprovided for, contrary to his intention; and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts, which he particularizes, and which are the same as the former trusts, with the exception of the particular expressly intended for correction, and of one other of the trusts, which he wholly omits; this omission, though probably undesigned, cannot be supplied. *Holder* v. *Howell*, 8 Ves. 97. The principle of this case seems to be inconsistent with, and it may therefore be considered to have overruled, the case of *Matthews* v. *Bowman*, 3 Anst. 727, where a testator having devised the residue of his estate to his daughters, *as tenants in common*, by a codicil made for a particular purpose redevised it to them,

but *omitting the words of severance*, it was held that the legatees were tenants in common. REVOCATION.

And here it may be observed, that, where a testator, by a codicil, revokes a devise or bequest in his will, stating, as the ground for such revocation, a fact which turns out to be false, the revocation does not take effect, being made, it is considered, to depend on a condition which fails. Thus, where a testator having bequeathed to the two grand-children of his late sister, 500*l.* each, by a codicil declared that he revoked the legacies bequeathed by this will to such grand-children, "*they being all dead*," it being proved that they were living, Lord *Loughborough* held that the legacies were not revoked. *Campbell* v. *French*, 3 Ves. 321. Had the testator in this case, instead of assuming the death of the legatees, founded his revocation on his advice or belief only of the fact, it is conceived that the decision would have been different. This distinction has been suggested, and seems to be warranted by the case of *Attorney-General* v. *Lloyd*, 3 Atk. 552, S. C. 1 Ves. sen. 32, where a testator, before the passing of the statute of 9 Geo. 2, c. 36, *ante*, p. 27, having devised lands and bequeathed personalty to be laid out in lands for charitable uses, by a codicil made *after* the passing of the statute, reciting, that, being advised the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did thereby give his personal estate to the charitable uses before mentioned, and he did thereby give his real estate to B. It was held, that the lands were effectually devised to B., though the testator's impression as to the invalidity of the devise in the will was erroneous. *Willet* v. *Sandford*, 1 Ves. sen. 178, 186. Conditional revocations.

So, where a testatrix, by her will, bequeathed 300*l.* among such of the children as should be living of E., and by a codicil declared as follows: "I give to my brother's son, C., the 300*l.* designed for E.'s children, *as I know not whether any of them are alive, and if they are well provided for;*" Sir *R. P. Arden*, M. R., held C. to be entitled, though the children of E. were living. His Honor, however, observed, "That it was argued, and with some ground, that, if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from *Cicero de Oratore*) of *pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla:* but the testatrix goes further, that she doubted, if they were living, whether they might not be well provided for; and she totally deprives them of that provision. The Court will not inquire whether they are well provided for or not." *Attorney-General* v. *Ward*, 3 Ves. 327.

Questions often arise whether legacies bequeathed by a codicil are payable out of the same fund, or are subject to the same restrictions as legacies bequeathed by the will. If the legacies are expressly given upon the same conditions, &c., of course the affirmative does not admit Whether legacies by codicil follow those given by will.

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of doubt. *Lloyd* v. *Branton*, 3 Mer. 108. And, where a testator, by his will, gave to his niece 1000*l.* to be paid to her at his decease if she were married, and if not, the interest to her for life, and the principal to her at her marriage. By a codicil, the testator gave to the same niece, 200*l. in addition to what he had given her by his will.* Sir *R. P. Arden*, M. R., held that the second legacy was to be raised out of the same fund, and was subject to the same conditions as the legacy by the will. *Crowder* v. *Clowes*, 2 Ves. jun. 449. In some instances, the same construction has prevailed on less palpable indication of similarity of intention in regard to the respective legacies or classes of legacies. *Brudenell* v. *Boughton*, 2 Atk. 268; *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *Fitzgerald* v. *Field*, 1 Russ. 425.

Whether legacy by codicil is exempt from duty like those of will.

A point which has been agitated, perhaps, more frequently than any other, is, whether a legacy bequeathed by a codicil is to participate in an exemption from duty, created by the will in favour of the legacies thereby given, or of some particular legacy for which the legacy in question is substituted. According to the cases, there must be a distinct manifestation of intention in the codicil, in order to exempt the legacy. (*Vide ante*, Vol. 8, p. 404; also, *Burrows* v. *Cotterell*, 3 Sim. 375).

Revoking effect of codicil by republishing an earlier will.

Sometimes a codicil has the effect of impliedly revoking the posterior of two wills (*a*), by referring to the prior one as the actual and subsisting will of the testator.

Thus, if a testator makes a will in 1820, and another in 1830, both of which, though inconsistent, remain undestroyed, and the testator then makes a codicil, which he declares to be a codicil to his will of 1820, this would set up the will of 1820 in opposition to that of 1830. *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402; S. C. nom. *Lord Walpole* v. *Lord Cholmondeley*, 7 D. & E. 138; and parol evidence, that he intended to refer to the will of 1830, would be inadmissible. *Crosbie* v. *Macdoual*, 4 Ves. 610. An inaccuracy in referring to the date of the first will would not prevent the application of this doctrine, unless it raised a doubt as to which was really intended. *Jansen* v. *Jansen*, cit. 1 Addams, 139. The fact, that the codicil is written on the same sheet of paper as the first will has been considered, in regard to personal estate at least, to indicate an intention to treat *that* as the subsisting will, especially as the second was out of the testator's possession, so that he had no opportunity of cancelling it. *Rogers* v. *Pittis*, 1 Addams, 30; see also Lord C. B. *Eyre's* judgment in *Barnes* v. *Crowe*, 1 Ves. jun. 488.

Every codicil deemed part of will.

In applying the doctrine of *Lord Walpole's case*, it is necessary to bear in mind that every codicil is a constituent part of the will, which in a general and comprehensive sense consists of the aggregage contents of

(*a*) Strictly speaking, nothing is the will of the testator which is not subsisting at his death; but, in discussing questions of this nature, it is impossible to avoid using the word in its less appropriate sense.

all the papers through which it is dispersed. Such a construction of the term "will," of course, prevents the confirming act of the testator from having the effect of setting up the will (using the word in its more confined sense), in contradistinction to, and in exclusion of any intermediate codicil or codicils which the testator may have engrafted on it. And, therefore, in a case where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of and additions to the will; and by a further codicil, *referring to the will by date*, he changed one of the trustees and executors, and in all other respects expressly confirmed *the will;* this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils; Sir *R. P. Arden*, M. R., observing, that, *if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it. Crosbie* v. *Macdoual*, 4 Ves. 610.

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The case of a codicil referring to the earlier of two existing wills belongs equally to the learning of revocation and republication, as the revocation of the posterior will is effected by the republication of the prior will, and may, therefore, aptly serve as a sort of stepping stone to the subject of republication, which next comes under consideration.

IX. REPUBLICATION.

REPUBLICATION.

Nature and effect of republication.

Republication is, in fact, re-execution, being a repetition of those ceremonies which are essential to the original efficacy of the will; so that, to republish the devise of a freehold estate, requires an attestation by three witnesses; while a will may be republished with respect to copyholds and personalty without any attestation (*a*). It is rarely necessary, however, to inquire into the republication of wills of personal estate, for this reason, that, as a residuary *bequest* embraces all the property owhich the testator dies possessed, it is not generally susceptible of enlargement by republication, whose effect is only to make the will speak from the period of its being republished, which, in regard to real estate, is often an important consideration; because, otherwise, the devise operates only on the property of which the testator is seised at the time of its execution (*b*). Thus, if a man devises all his real estates to A. and his heirs, and after-

(*a*) Throughout the present section, republication must generally be considered, for the reasons mentioned in the text, as viewed in reference to real estate only, unless the contrary appears. As to the republication of wills of personalty, *vide Long* v. *Aldred*, 3 Addams, 48; *Miller* v. *Brown*, 2 Hagg. 209.

(*b*) *Vide ante*, p. 8.

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wards purchases freehold or copyhold lands of inheritance, and then republishes his will, the purchased estate will pass to the devisee by the effect of the republication. *Acherley* v. *Vernon*, Com. 381; 2 Eq. Ca. Ab. 769, pl. 1; 3 B. P. C. Toml. ed. 85; *Potter* v. *Potter*, 1 Ves. sen. 437. And, *pari ratione*, if the devise were of the testator's real estates in Kent, an estate in that county bought by or descended to the testator after the execution and before the republication of the will would pass. *Beckford* v. *Parnecott*, Cro. El. 493; *Barnes* v. *Crowe*, 1 Ves. jun. 486, S. C. 4 B. C. C. 2.

Republication actual and constructive.

Republication is of two kinds, express and constructive. Express republication, as already noticed, is merely the repetition of the ceremonies which constitute an execution of the will. Constructive republication

Republication by codicil.

takes place where a testator makes a codicil to his will, the effect of which, if the codicil be duly attested by three witnesses, is to republish the will, and thereby bring within any general or residuary devise which it may contain lands of inheritance acquired since the execution of such will, though the codicil expresses no intention to republish, or though it be not annexed to, or declared to be a part of, or do not in terms confirm the will, and whether the codicil relate to real estate or to personalty only, the result being precisely the same as if the general or residuary devise

General devise extended by republication to intermediately acquired lands.

had been incorporated into the republishing codicil. Thus, where a testator, being seised of two thirds of the manor of Chesterton, devised all his manors and lands (enumerating, among others, Chesterton,) to trustees, and then purchased and took a conveyance of the other third of the manor, and afterwards made a codicil to his will, attested by three witnesses, which he styled a codicil to be annexed to his last will and testament, and made part thereof to all intents and purposes; but the whole purport of it was to revoke a bequest in the will to one of his daughters. The codicil was not annexed. Sir *W. Grant*, M. R., held that this was a republication. *Pigott* v. *Waller*, 7 Ves. 98.

So, where a testator, having by a will duly attested devised all his lands, subsequently purchased a freehold estate, and then by a codicil, attested by three witnesses, devised certain freehold property, but not the purchased estate, it was treated as quite clear that the latter passed under the will by the effect of the republication. *Goodtitle* v. *Meredith*, 2 Mau. & Selw. 5.

Again, where a testator, by a will duly attested, devised all his lands to certain uses; and then executed two codicils, attested by two witnesses only, both which contained directions respecting his real estate, and afterwards executed a third codicil, which was attested by three witnesses, but merely contained an appointment of an executor in the room of one of the executors appointed by the second codicil—it was held to be clear (among other points that were more doubtful) that this codicil republished the will, so as to make the general devise operate upon an after-

purchased estate. *Guest* v. *Willasey*, 12 Moore, 223. See also *Doe* v. *Davy*, Cowp. 158; *Gibson* v. *Montfort*, 1 Ves. sen. 485.

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It has been held, that the circumstance of the testator having, by the codicil, expressly devised part of his estates, purchased since the execution of the will, to the uses therein declared concerning his residuary real estate, will not exclude the rest from the operation of the same residuary devise brought down by the republishing effect of the codicil to the date of such codicil. *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Hulme* v. *Heygate*, 1 Mer. 285. Indeed, when we admit that the effect of the republication is to make the will speak from the period of the execution of the codicil, it seems necessarily to follow that an express devise in the codicil of particular lands, acquired since the execution of the will, to the residuary devisee, could no more exclude the rest from the residuary devise thus republished, than a similar devise in the will itself could prevent other lands, then belonging to the testator, from passing to him under such residuary clause.

Express devise of part to residuary devisee does not negative his claim to the rest.

Perhaps, in no instance, early or recent, has the republishing operation of a codicil been carried to so great a length as in the case of *Rowley* v. *Eyton*, 2 Mer. 128, where after-acquired lands, expressly devised by the codicil to the residuary devisee of the will, were held to be subject to a general charge of debts created by the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E., and, having subsequently purchased several copyhold estates, by a codicil attested by three witnesses, *devised them to his said son in fee*—Sir *W. Grant*, M. R., held that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts. Perhaps, it is not quite clear that the decision would have been the same if the codicil had devised the lands in question to any other person than the residuary devisee in the will (*a*).

Case of *Rowly* v. *Eyton*.

(*a*) This case evidently supposes that a general charge of debts extends to lands specifically (or, to speak more accurately, to lands particularly) devised, as well as to those which pass by the residuary devise—a point that was much discussed (the charge, however, being of legacies instead of debts) in the case of *Spong* v. *Spong*, 1 You. & Jerv. 300, S. C. in Dom. Proc. 3 Bligh, New Ser. 84, where a testator, after devising lands to various persons, and having charged his real and personal estate with his legacies, and then bequeathed some legacies, gave the residue of his real and personal estate to A. The Court of Exchequer held the legacies to be charged as well upon the lands specifically devised as the lands forming the residue; but the House of Lords reversed this part of the decree. Lord *Manners* argued at some length in favour of this reversal, contend-

Whether a charge of legacies extends to lands specifically devised.

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Effect of republication negatived by the contents of the codicil.

But, of course, the operation of a codicil to extend the devise in the will to intermediately acquired lands, may be negatived by the language of the codicil itself, indicating a contrary intention; for, though the republication takes place without any positive expression of intention, yet it can never operate in spite of the intention. The leading case of this class is *Bowes* v. *Bowes*, 7 D. & E. 482, S. C. 2 Bos. & Pull. 500, which was as follows:—G. Bowes, Esq., in 1749, devised all his lands and hereditaments (with certain exceptions not here material to be stated) to his wife and five other persons in fee, upon certain trusts. In 1754, he bought, and became seised of, an undivided part of a freehold property. In 1758, by a codicil duly attested, reciting that he had by his will devised all his lands and hereditaments to his wife and the other persons (naming them) upon trust, he thereby revoked all the above devises, so far as related to two of the trustees; and he thereby gave and devised his SAID *lands, tenements, and hereditaments* to the remaining trustees, (naming them), their heirs and assigns, upon the same trusts and purposes as he had devised the same by his will, at the same time revoking the legacies he had given to the removed trustees; and the testator concluded with declaring the codicil to be part of his will. Lord *Loughborough* sent a case to the Court of King's Bench, with the question whether the codicil was a republication; and that Court certified in the negative, (7 D. & E. 482), which was in effect confirmed by his Lordship's order. The case was then carried by appeal to the House of Lords; and the question was put to the Judges, who were unanimously of opinion that the will was not republished; on the ground that the word "said" confined the operation of the codicil to the lands which had actually been devised

Devise in republished will, not extended to lands intermediately acquired.

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ing that, in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished, especially as, in the case under consideration, the testator had shewn such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee. His Lordship intimated that the opinions of Lord *Eldon* and Lord *Redesdale* coincided with his own. Some of Lord *Manners's* reasoning would have applied to *Rowly* v. *Eyton*, where it might have been contended that the testator, by expressly devising by the codicil the lands in question to the residuary devisee, shewed that he intended to distinguish them from the lands comprised in the residuary devise. It is to be regretted, therefore, that this case was not cited in the House of Lords, though possibly it might not have shaken the opinion of the noble Ex-Chancellor of Ireland, who considered that a charge of debts and legacies stood upon a different footing, as appears also to have been the notion of Lord *Alvanley* on several occasions. (*Vide* 2 Ves. jun. 328; 3 Ves. 739; 5 Ves. 359).

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by the will. Lord *Thurlow* (formerly Lord Chancellor) alone dissented; his Lordship's argument being, that the testator, when he recited his having devised all his lands, supposed his after-purchased would pass, and that the words "*my said lands*" referred to what he had supposed he had conveyed. Lord *Eldon*, however, shewed that the House ought to decide the question as if the testator actually *did* know that the will had not passed the after-purchased lands; that, when in the codicil he referred to the will as having passed all his lands, he did no more than recite his former devise; but that, when he came to the operative part of the codicil, he changed the tense of the verb; and, though in the former part he said "Whereas, I have devised," &c. yet in the latter he said, "I do hereby revoke, and I do hereby give and devise." If, therefore, by the former words, "all my freehold and copyhold lands," the testator were understood to include all the after-purchased lands, by the latter words of the codicil he must be understood to be revoking a devise of these lands which he had not at the time the will was made; *for, his expressions of revocation were co-extensive with the expressions of devise*; these expressions, therefore, unless explained by the context, would be unintelligible: but the word "said" clearly shewed that they were both intended to be confined to the lands which the testator possessed at the time of the will, and this construction rendered them consistent.

So, where a testator, having by his will devised his real estate, and subsequently acquired other lands by descent, but supposing them to have passed to him and his sons in strict settlement by the will of the last owner (which, however, turned out to have been revoked by a common recovery), he, by a codicil, altered certain limitations in his will *for the express purpose of preventing the union of his own estates with the estates supposed to be devised;* the Court concurred in the argument, that the language of the codicil negatived the application of the devise in the will to the property in question. *Parker* v. *Biscoe*, 3 J. B. Moore, 24.

Again, where a testator, who had by his will devised to his wife certain lands and all his residuary real and personal estate, by a codicil devised and bequeathed, in case his wife should die before him, all his *said* lands and real estate, and also all his personal estate, to trustees, upon certain trusts—Lord C. B. *Alexander* was of opinion, on the authority of the case of *Countess of Strathmore* v. *Bowes*, that the codicil was not a republication of the will, so as to make it pass estates purchased by the testator between the making of his will and of his codicil. *Smith* v. *Dearmer*, 3 You. & Jerv. 278.

Lastly. Where a testator having, by his will, after certain particular devises, devised all the residue of his real estate to his brothers, A., B., and C., by a codicil, reciting that he was desirous of making a more liberal provision for his wife, and that she might enjoy the whole of his real estates for her life, gave certain lands to his wife, which by his will he had

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given to his brothers, and then devised a certain property and all other *the real estate which by his will he had given to his brothers,* in trust *(inter alia)* for his wife for life, and, subject thereto, upon the trusts declared by his will—it was held by Sir *J. Leach,* M. R., and afterwards, on appeal, by Lord *Brougham,* C., that, notwithstanding the generality of the testator's recited intention respecting his wife, the terms of the dispositive part of the codicil prevented its operating to republish the residuary devise in the will, so as to comprise two freehold houses which the testator had, since its execution, acquired. *Monypenny* v. *Bristow,* 2 Russ. & M. 117.

Effect of republication on particular devises.

Hitherto, republication has been viewed only as affecting general devises. In regard to particular devises, the principle, that the will speaks from the date of the republication, is to be received with more qualification and reserve. Unquestionably, the devise of a particular property, republished by the re-execution of the will, or the execution of a codicil, will comprise a new estate in that property intermediately acquired by the testator, and falling within the terms of the republished devise, but will never, it is conceived, operate on a property different from that which the devise was originally designed to embrace, though answering to the same description. Thus, it is clear, that, if a testator, having a renewable leasehold estate, devises it, afterwards renews the lease, and then republishes the will, the renewed lease will pass under the devise. *Carte* v. *Carte,* 3 Atk. 180; see also *Alford* v. *Earle,* 2 Vern. 209. So, where a testator devises certain freehold lands, which devise is revoked by a conveyance of the lands to particular uses, with the ultimate limitation to the use of the testator himself in fee, after which the testator makes a codicil to his will, attested by three witnesses; the estate which reverted to the testator on the execution of the revoking conveyance will, by the effect of the republication, pass under the devise. *Jackson* v. *Hullock,* 2 Eden, 263.

Republication does not revive a lapsed devise.

On the other hand, it is clear, that, where a testator devises lands to A. and the heirs of his body, and A. dies, leaving issue, in the lifetime of the testator, who subsequently republishes his will, the republication does not entitle the heir in tail of A. to the property devised to his ancestor. *Doe* v. *Kett,* 4 Durn. & East, 601. And the result would be the same, it is conceived, though the description of the devisee should be no less appropriate to the heir in tail than to the ancestor; for, it is not to be doubted, that, where a testator devises lands to his son John, who dies in the testator's lifetime, and he afterwards has another son of the same name, the republication of the will would be inoperative to carry the property to the second son John. 2 Ves. sen. 626. Nor is the case of *Perkins* v. *Micklethwaite,* 1 P. W. 275, rightly understood, at all contradictory to this hypothesis; for, though in that case a legacy, originally designed for a son of the testator, who died after the execution of the will, was held to belong to a subsequently born son of the same name, by the effect of the

codicil, yet the express terms of the codicil appear to have warranted the construction, since it gave to the latter a legacy *over and above what the testator had given him by his will.* REPUBLICATION.

Agreeably to this view of the subject, it has been repeatedly held, that a pecuniary legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy. *Izard* v. *Hurst*, 2 Freem. 224; *Monck* v. *Lord Monck*, 1 Ball & Beatty, 298; see also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Crosbie* v. *MacDoual*, 4 Ves. 610. The case of *Holmes* v. *Coghill*, 7 Ves. 499, S. C. 12 Ves. 206, seems to afford a further confirmation of the principle here stated. There, the testator, having, under his marriage settlement, (subject to an estate for life to himself, and an estate tail limited to his sons in strict settlement), a power to charge 2,000*l.* upon certain estates, executed that power by will duly attested. Afterwards, he and his eldest son suffered a common recovery, and limited the lands to uses discharged from the power. By the same instrument they limited to the testator a power by will to charge the 2,000*l.* on other lands. Subsequently, he executed a codicil duly attested to his will. It was contended, that this codicil, by republishing the will, rendered it a good execution of the new power. But, Sir *W. Grant*, though he admitted the general principle as to republication, held, that this was not a good execution of the power. "It speaks," said he, "only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration, affecting different estates." Adeemed legacy not revived by republication.

Though it is quite clear, as we have seen, that republication has no effect in restoring the operation of a lapsed specific, or rather particular devise; yet, a different and more difficult question is, whether the lands of which the devise has so lapsed, will pass by a residuary devise in the republished will. This seems to depend on the point, whether, if the particular devisee had been dead when the will was made, the residuary devise would have comprised the lands expressed to be given to the person so deceased; for, if it would not, then the lands, the devise of which *subsequently* lapses, cannot, by the effect of the republication, pass under the residuary devise, because republication merely makes the will speak from its own date, and cannot bring within the grasp of a devise in the will, any subject which it would not have comprehended, in case the circumstances under which the republication takes place had existed at the original execution of the will. In short, the inquiry is no other than simply this, whether a residuary devise will include particular lands, the devise of which is void *ab initio.* Whether a republished residuary devise will pass what has lapsed.

The only direct authorities on the point which the editor has succeed- Whether a resi-

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duary devise will pass lands comprised in a void devise.

ed in finding, are the following:—In *Doe* v. *Sheffield*, 13 East, 526, the Court of King's Bench treated it as clear, that, where a testator devised certain lands to the sister of A., and the residue of his lands, not thereinbefore disposed of, to B., and it turned out that all the sisters of A. were dead when the will was made, the estate so devised passed by the residuary clause. The facts of the case, however, as eventually ascertained, did not raise the question. In *Williams* v. *Goodtitle*, 10 Barn. & Cress. 895, a testator, by his will, after making certain particular devises, gave all the residue of his estate not thereinbefore particularly devised to his wife, E. T., her heirs and assigns for ever. The testator then purchased other real estates, and afterwards made a codicil, attested by three witnesses, whereby, after reciting that he did by his will devise and bequeath all the residue of his real and personal estate he was then possessed of, he ratified and confirmed his will. The testator then reciting, that, since the date of his will, he had purchased other property, devised the same to his wife for life; and after her death, the testator devised the lands in question *upon trusts that were bad in law*, and the residue specifically to other persons in fee. The question was, whether the widow was entitled, under the residuary devise in the will, to the part ineffectually attempted by the codicil to be devised; and the Court determined that she was. Lord *Tenterden*, C. J., observed, that the will and codicil were to be considered as one instrument made at the date of the codicil. Then it appears that there is a devise to the wife for life, then certain other devises follow; and lastly, there is a general residuary clause in favour of the wife. His Lordship said, it was admitted, that if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under the residuary clause. And he thought that the expression, at the commencement of the codicil, shewed the intention of the testator to have been to ratify his will as to all that he was possessed of at the time of the ratification.

Remarks on *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*.

Although it must be confessed, that, in the cases just stated, the extension of a residuary clause to lands comprised in a specific or particular devise in fee, which is void *ab initio*, appears rather to have been assumed than discussed; and though, if the matter were *res integra*, there would certainly be strong ground to contend, that a residuary devise, being in its nature specific, ought not to extend to any interest in real estate, which is professed to be otherwise disposed of by the same will; yet, considering how unsteady has been the adherence to this principle (*vide ante*, p. 97), the probability seems to be, that if the point were now to arise, it would be held, in accordance with the impression of the Judges who decided *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*, that a residuary devise takes in all that is not effectually disposed of, *according to circumstances existing at the making of the will;* and the inevitable consequence would be, that, in the case of a particular devise in fee lapsing, followed by

the republication of the will, a residuary clause in the republished will would operate on the lands comprised in the lapsed devise. The point, however, cannot be considered as settled.

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If the residuary devise itself has lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would, nevertheless, die intestate as to one third, since the subsisting devise, which originally embraced two thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety.

Republication does not revive lapsed residuary devise.

X. ESTATES ARISING BY IMPLICATION.

ESTATES BY IMPLICATION.

An heir-at-law can only be disinherited by express devise or by necessary implication, which has been defined to be—so strong a probability that the contrary cannot be supposed; as, where the testator devises to his heir after the death of his wife, it being impossible to suppose that he would do any thing so absurd as the making a devise of lands to take effect at a future period to him who would by law take them in the mean time, the wife is held to have an estate for life by implication. See *City of London* v. *Garway*, 2 Vern. 571; *Dyer* v. *Dyer*, 1 Mer. 414. And it is immaterial whether the devise to the heir is in fee or for life, or in tail. See *Philips* v. *Philips*, 1 P. W. 34. But, if the devise is to any person other than the heir, no such irresistible inference arises, because a testator may *possibly* intend to postpone a devise to a stranger, in order that the property in the meantime may devolve to the heir. Accordingly, it is well settled, that if lands are devised after the decease of A. to B., not being the testator's heir-at-law, an estate for life to A. cannot be implied, but the lands descend to the heir during the life of A. *Faulkner* v. *Faulkner*, 1 Vern. 20; *Aspinall* v. *Petvin*, 1 Sim. & Stu. 544.

Estate for life implied from future devise to the heir.

The same implication is said to arise from a devise to one of several co-heiresses; as where a man, having two daughters but no son, devises to one of his daughters after the death of his wife, in which case the wife, according to an early dictum, takes an estate for life by implication. *Hutton* v. *Simpson*, 2 Vern. 723: see also arg. *Willis* v. *Lucas*, 1 P. W. 472. But this position seems to carry the implication doctrine beyond the scope of the reasoning on which it is founded, since there is no incongruity in a person devising *in futuro* to *one* of several co-heiresses, intending the property in the interim to descend to *all*. And it is observable, that, in *Willis* v. *Lucas*, 1 P. W. 475, Lord Chancellor *Parker* avoided expressing any opinion on the point, whether a devise of gavel-

Devise to one of several co-heiresses.

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kind lands to one of several co-heirs raised an implied estate; though he considered it clear, in regard to *other* lands, that the testator had, by giving to the eldest son (*i. e.* the heir) an immediate annuity out of the land, plainly shewn that he was not to have the land itself.

Annuity to the heir.

It is conceived, that the state of the devisor's family at the time of the making of the will, and not its state at the testator's decease, must regulate the application of the doctrine in question. Thus, if a man having two sons devises freehold lands to his younger son in fee, after the decease of his wife, the latter would not take an estate by implication, although in event (*i. e.* by the decease of the elder son without issue in the testator's lifetime) such younger son might happen to become heir at the testator's death.

Distinction where there is an express devise of part.

If the person, at whose decease the devise to the heir is expressed to arise, is an express devisee for life of part of the lands, the words referring to the devise as taking effect at his decease, will be considered to point to that devise, and not as inserted for the purpose of postponing the devisee's enjoyment of the residue. As, where a testator devises Blackacre to his wife for life, and afterwards devises all his lands to his eldest son after the death of his wife, the words will be marshalled, the expression referring to the decease of the wife being taken to apply exclusively to Blackacre, and consequently the ground for raising an implied estate in the wife in the residue of the lands fails. *Simpson* v. *Hornsby*, Pre. Ch. 439, 452, S. C. 2 Vern. 722; *Boon* v. *Cornforth*, 2 Ves. sen. 277; *Dyer* v. *Dyer*, 1 Mer. 414: but see *Aspinall* v. *Petvin*, 1 Sim. & Stu. 544.

Also where there is a residuary devise.

The doctrine which raises, from a future devise to the heir, an implied gift of the lands intermediately, supposes that the will does not contain a residuary clause capable of comprehending such intermediate estate, which clause, by disposing of that estate, would, of course, completely exclude the implication. Thus, if a testator devises Blackacre to his heir after the death of his wife, and in the same will devises the residue of his real estate to a stranger, since the estate for life not included in the devise to the heir would, if no implied gift were raised, pass to the residuary devisee, which might possibly be intended, it should seem, that the residuary devisee, and not the wife, would take the estate during her life.

And it is farther observable, that where the will contains a residuary devise, a devise of particular lands to the residuary devisee, to take effect *in futuro*, gives rise to precisely the same argument in favour of the implication, as a devise to the heir; for instance, where a testator devises Blackacre to his youngest son after the death of his wife, and then devises all the residue of his real estate to his youngest son, to suppose that he intends Blackacre, which he has devised to the youngest son at the death of the wife, to go to him in the meantime under the residuary clause, involves the same absurdity as to suppose that an heir is to

take immediately what is expressly given to him at a future period, and therefore the wife would, undoubtedly, take an estate for life.

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Applying to estates tail the principle which governs the implication of estates for life, it is not to be doubted that, if lands were devised to the heir in fee, in case A. should die without issue, this would make A. tenant in tail with reversion in fee to the heir. The reports, however, do not present such a case, the implied gifts of estates tail which they supply being of a different nature. According to those cases, if lands are devised by a man to A. in fee in case *his* (the testator's) *eldest son and heir apparent* shall die without issue, such son will take an estate tail by implication; *Newton* v. *Barnardine*, Moore, 127, pl. 275; *Roe* v. *Vernon*, 5 East, 51; but if the person, in default of whose issue the devise over is to take effect, be *a stranger*, and the devise over is not to the heir, no implied intail is raised, and the devise in question consequently is void as an executory devise to take effect after an indefinite failure of issue. *Gardiner* v. *Sheldon*, Vaugh. 259, S. C. 1 Eq. Ca. Ab. 197, pl. 6.

Implication of estates tail.

Cases, however, are not wanting in which estates tail have been implied from a devise to take effect on the indefinite failure of issue of a stranger, but they are not to be relied on as establishing any general rule to this effect, inconsistent as it appears to be with sound principles of construction. *Tenny* v. *Agar*, 12 East, 253; *Romilly* v. *James*, 6 Taunt. 263. See also *Daintry* v. *Daintry*, 6 D. & E. 307.

The same general doctrines which govern the implication of gifts of real estate apply in relation to personal bequests; for, though the rejection of vague and conjectural implications is frequently stated as if it were the result of favour shewn to the *heir*, yet it is clear that equal protection would be afforded to *all* persons on whom the law casts property of any kind which is not disposed of, that protection being nothing more than what is involved in an adherence to the sound axiom, that the disposition of the law shall be defeated only by the unequivocal disposition of the party. Accordingly, we find it laid down in an early case, that, where a man devised a term to his son after the death of his wife, and made other persons his executors, this was but a demonstration when the estate of the son should commence, *and in the interim the executors might well have it.* *Horton* v. *Horton*, Cro. Jac. 74: and see *Rayman* v. *Gold*, Moore, 635, pl. 871.

Implication of gifts of personalty.

In direct and avowed opposition to these authorities, however, the Court of King's Bench, of a later day, held, that where A., possessed of a term determinable with the lives of B. and C., bequeathed the same to his daughter A., after the death of his daughter B., during the life of C., B. took an estate for life by implication; *Roe* v. *Summerset*, 5 Burr 2608; but this decision (which is prominently brought forward whenever a case of implication is attempted to be raised) cannot safely be considered as taking bequests of personalty out of the general doctrine.

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The implication would, of course, be warranted where a testator bequeathed a term to A. after the death of B., and then gave all the residue of his personalty to A., since the case admits of the same line of reasoning as applies to a future devise of lands of inheritance to the heir. See *Horton* v. *Horton*, Cro. Jac. 75.

Gifts implied from powers of selection and distribution.

Another species of implied gifts is created by powers of selection or distribution in favour of a defined class of objects; for, where a fund is given to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, a gift will be implied; the presumption being, that the testator could not have intended that the objects of the power should be disappointed of his bounty by the neglect of the donee to exercise it in their favour; *Harding* v. *Glyn*, 1 Atk. 469; *Cruwys* v. *Colman*, 9 Ves. 319; *Forbes* v. *Ball*, 3 Mer. 437; *Walsh* v. *Wallinger*, 2 Russ. & M. 78; and the circumstance that the testator has expressly given the property to the objects of the power in a certain event (as that of the donee dying before him), has been held not to negative the implication. *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431. If the subject of the power were lands of inheritance, it would be a question whether the implied estate were for life or in fee. There would be strong ground for the latter construction, if the power authorized the limitation of estates in fee. The point was glanced at, but was not raised, in the case of *Casterton* v. *Sutherland*, 9 Ves. 445.

As to implying gifts to children from a gift over in default.

A few other points respecting implied gifts should be noticed. It was formerly doubted whether a legacy to a person, with a bequest over, if he die without children, raised an implied gift in the children. The negative is now clear, as the hypothesis in favour of the children amounts only to conjecture and not to necessary implication; and, therefore, the effect of the having or leaving a child (as these words may happen to be construed) is no more than to render the interest of the legatee absolute. *Weakley* v. *Rugg*, 7 Durn. & E. 322; *Doe* v. *Wetton*, 2 Bos. & Pull. 324.

Devise over in case of death during minority.

The same considerations would seem to apply where a gift is made to A. during the minority of his son B., *and in case B. shall die under twenty-one*, then over to the other sons of A., without any alternative gift in the event of B. attaining the prescribed age. Though every suggestion of probability is in favour of an intention to give the property to B. at his majority, yet there is some difficulty in obtaining such a result without trenching upon the rules which exclude conjectural interpretations. But, in such a case, the Courts lay hold of every slight circumstance as a foundation for the implication. *Goodright* v. *Hoskins*, 9 East, 306.

Implication from gift to survivors.

A devise to the survivors of several persons, though giving rise to a strong suspicion that the testator must have meant that all should take

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during their joint lives, seems scarcely to afford that irresistible inference which the law calls a necessary implication; but see *Saunders* v. *Lowe*, 2 Blackst. 1014. So, a gift of an annuity to several persons for their lives, and the life of the survivor, has been held not to create a gift to the survivor, but merely to prolong the endurance of the interests of the legatees and their representatives to the decease of such survivor. *Jones* v. *Randall*, 1 Jac. & Walk. 100.

Implication of cross remainders among devisees for life.

Whether a gift to several persons as tenants in common for life, with a remainder over of the entirety after the death of the survivor, would raise cross remainders by implication for the purpose of filling up the vacancy between the death of the pre-deceasing devisees and of the survivor, has never been decided. The result, sometimes, has been attained by rejecting the words which create the tenancy in common. *Tuckerman* v. *Jeffries*, 3 Bac. Ab. 681; *Armstrong* v. *Eldridge*, 3 B. C. C. 215.

—between devisees in tail.

And here we must take some notice of the well-known doctrine respecting the implication of cross-remainders between devisees in tail. By this doctrine, where lands are devised to several persons as tenants in common (*a*) in tail, and the testator has evinced an intention that the estate shall not go over to the ulterior devisee until failure of the issue of *all* the tenants in tail, cross-remainders are implied between them; and to this end nothing more is requisite than the ordinary words used to connect an estate tail and the ulterior devise, as in the instance of a devise to A., B., and C., as tenants in common in tail, and, *in default of such issue*, or *in case they shall die without issue*, then over; and it has even been held, that the mere word *remainder* will raise cross-remainders. *Doe* v. *Burville*, 2 East, 47, n. Modern authorities have delivered the doctrine from several unmeaning distinctions which formerly embarrassed its application, such as a difference between devises to two and to a larger number, and between devises to the tenants in tail simply, and a devise to them *severally* or *respectively*. *Wright* v. *Holford*, Cowp. 31; *Phipard* v. *Mansfield*, Id. 797; *Watson* v. *Foxon*, 2 East, 36; *Doe* v. *Webb*, 1 Taunt. 237; *Green* v. *Stephens*, 12 Ves. 419, 17 Ves. 64; *Mortimer* v. *West*, 2 Sim. 274; *Doe* v. *Jenkins*, 3 Moore & Pay. 59; *Livesey* v. *Harding*, 1 Russ. & Myl. 636.

Remarks on doctrine advanced in *Livesey* v. *Harding*.

In the last case, Sir *J. Leach* is reported to have said, "where there is a gift to two persons only, and the heirs of their bodies, cross-remainders will be implied, *although there is no expressed intention that no part of the estate shall go over until the failure of issue of both*, unless the limitation to them be *successively*, *severally*, or *respectively*, and then the remainders over will be several and respective." These observations might seem to import that a devise to two persons as tenants in common in tail

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(*a*) As to tenancy in common between devisees in tail, *vide post*, sect. 17.

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will raise cross-remainders *without any subsequent words*—a proposition which would go to revive the distinctions in the old cases (usually considered as exploded) for a purpose entirely new. In those cases, the point in controversy was, whether words introducing the devise over would raise cross-remainders between more than two devisees, or where the gift was to the devisees "respectively," &c.; and it was never conjectured that the implication could arise without some such words. Possibly the reporters, notwithstanding their general accuracy, misunderstood what fell from the learned Judge, who could scarcely have intended to propound, extra-judicially, (for the case before the Court did not raise the suggested points), a doctrine at once so novel and, it is conceived, so untenable.

AMBIGUITIES, PAROL EVIDENCE.

XI. AMBIGUITIES IN WILLS, AND ADMISSIBILITY OF PAROL EVIDENCE.

Devises fail from uncertainty, when.

Uncertainty with respect to any essential particular in a gift necessarily defeats it. Such uncertainty may arise either from the absence of declared intention, or from the obscurity produced by contradictory declarations. A simple instance of the former, resulting from indefiniteness as to the subject-matter of the gift, occurs in the case of *Bowman* v. *Milbancke*, 1 Lev. 130, S. C. Raym. 97; where the expression, "I give all to my mother," was held to be insufficient to pass lands. So, in the more recent case of *Mohun* v. *Mohun*, 1 Swanst. 201, S. C. 1 Wils. 151, the Court arrived at the same conclusion, on nearly similar words, viz. "I leave and bequeath to all my grandchildren, and share and share alike." So, in the case of *Jones* v. *Hancock*, 4 Dow, 145, where a testator devised to his daughter A. for life, with remainder to her first and other sons in tail male, with remainder to his daughter B., adding that the devise to A. was upon condition that she married a man possessed of property at least equal to if not greater than the property that he left her; and if she married a man with less property than that, then the testator left her only so much property of his as should be equal to the property of the man she married, and all the remainder of the property should pass over to B. The House of Lords held the devise over to be void for uncertainty. *Gibbs*, C. J., who delivered the opinion of the Judges, rested his arguments principally on technical reasoning, tending to shew that it was essential to a tenancy in common that it should appear on the face of the instrument creating it what the specific interest of each tenant was, as appeared by the various writs giving remedies to tenants in common, all of which defined the shares intended to be recovered.

Uncertainty of the devisees' shares.

Other species of uncertainty.

Sometimes, the uncertainty arises from indefiniteness and obscurity as to the event on which the devise is to take effect; *Attorney-General* v. *Sibthorp*, 2 Russ. & M. 107; or from the devised estate being directed to go in the same manner as the testator's other estates, of which there are

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several, variously disposed of, and it does not appear which is intended. *Leslie* v. *Duke of Devonshire*, 2 B. C. C. 187.

It would be useless to multiply examples of gifts void for uncertainty, which more frequently occur in the early than in the later cases; for latterly the Courts have preferred acting upon very faint glimpses and slight indications of the testator's intention to holding the gift to be absolutely void for uncertainty, freely supplying, transposing, rejecting, and sometimes even changing words, to prevent the total failure of the devise. *Dent* v. *Pepys*, 6 Madd. 350; *Langston* v. *Pole*, 2 Moore & Pay. 490. An illustration of the leaning to such a construction occurs in an early case, where the devise was to one of A.'s daughters that should marry with a Norton within fifteen years; it was contended that the devise was void for uncertainty, as two might marry with a Norton. But the Court agreed that the devise was good; for, that though the words were not who should *first* marry with a Norton," yet it was all one, because the law supplied these words. *Bate* v. *Norton*, Raym. 82.

Judicial anxiety to effect a devise.

It is not necessary that all the parts of a testator's description of the subject of gift should be accurate. It is only requisite that enough of correspondence should exist in some one particular, to remove all doubt of identity. Thus, a reference to occupancy will cure an error in local description, and *vice versâ; Parker* v. *Ayres*, 3 Keb. 637; *Halstead* v. *Searle*, 1 Lord Raym. 778; and an agreement in locality, an error in the tenure, as where leasehold is described as freehold, or freehold as leasehold, *Day* v. *Trig*, 1 P. W. 286; *Denn* v. *Kemeys*, 9 East, 366. And the same principle of construction applies to the respective parts of a description. Thus, in regard to locality, if the parish is right and the county wrong, the error is immaterial, provided the identity of the parish is not thereby brought into question. *Brown* v. *Longley*, 2 Eq. Ca. Ab. 416, pl. 14; *Langenew* v. *Bean*, Finch, 395.

Description need not be correct in all parts.

And the same rule, of course, obtains in regard to the objects of gift. Thus, if a testator devises to John, the son of his brother William, and William's only son is named Samuel, the claim of Samuel would be unquestionable, notwithstanding the misnomer. *Brown* v. *Langley*, 2 Eq. Ca. Ab. 416, pl. 14; *Rivers's case*, 1 Atk. 410; *Still* v. *Hoste*, 6 Madd. 192. So, where the testator gives to Thomas, the second son of his brother John, the second son, though not named Thomas, will take, the brother having no son of that name. *Stockdale* v. *Bushby*, Geo. Coop. 229.

Where the uncertainty arises from repugnancy, the expounding Judge is not so absolutely destitute of resources for rendering the devise effective as where it arises from a defect of expression; for, if any principle can be discovered warranting the preference of either of the discordant parts, the uncertainty is removed. Such a principle is supplied by the general doctrine, which discards the prior and gives effect to the posterior of two wills, which doctrine, applied to several parts of the same will,

Latter of two repugnant clauses preferred.

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obviously suggests the prevalence of the latter part; and, accordingly, it has been held, that if two parts of a will are absolutely irreconcileable, the latter shall prevail. *Ulrich* v. *Litchfield*, 2 Atk. 372; *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100; *Doe* v. *Biggs*, 2 Taunt. 109.

But to be reconciled if possible.

Resort, however, is never had to this unsatisfactory rule until the complete failure of every attempt to give the will such a construction as will render all its clauses consistent and operative, in attaining which object the local order and arrangement of the various parts will be disregarded. Thus, if a testator devises all his property to A., and afterwards gives a specific part to B., the will will be read as giving part to B. and the remainder to A. *Cuthbert* v. *Lempriere*, 3 Mau. & Selw. 158. And if a testator gives Whiteacre to A. in fee, and afterwards gives the same lands to B. for life, the will will be read as a devise to B. for life, with remainder to A. in fee. *Anon.* Cro. El. 9; *Ridout* v. *Dowding*, 1 Atk. 419. See also *Holdfast* v. *Pardoe*, 2 Sir W. Blackst. 976; *Woolcomb* v. *Woolcomb*, 3 P. W. 112; *Bettison* v. *Rickards*, 7 Taunt. 105. And even where, in different parts of the will, the same property is given to two persons in fee, it seems to be the better opinion that they will be held to take as joint tenants; see *Anon.* 3 Leon. 11, pl. 27, arg. *Fane* v. *Fane*, 1 Vern. 30; and not the whole to the posterior devisee, which is the alternative construction, and has had some powerful advocates. Co. Litt. 112. b. See also *Ulrich* v. *Litchfield*, 2 Atk. 374. The liberty taken by the Courts in transposing the clauses of a will, in order to render the whole consistent, might be illustrated by a great variety of cases, and is, indeed, one of the most familiar doctrines of testamentary construction.

Repugnant words rejected.

The rule which prefers the posterior of two inconsistent clauses, must not be so applied as to give undue weight to words of mere repugnancy, engrafted on a preceding, clear, and definite devise, and which ought, according to the authorities, to be rejected. Thus, where a testator devises to A. and his heirs *for their lives*, the devisee has been held to take a fee in spite of the added inconsistent words. *Doe* v. *Stenlake*, 12 East, 515. So, where a testator bequeathed an annuity to be equally divided between A., B., and C., adding "to them and their heirs, or the survivor of them, *in the order they are now mentioned*," the latter words were disregarded as being of uncertain meaning, and inconsistent with the plain preceding expressions denoting equality of division. *Smith* v. *Pybus*, 9 Ves. 566.

So, a devise unambiguously expressed will not be cut down by the reason assigned, which does not support its whole extent. *Cole* v. *Wade*, 16 Ves. 27.

Upon the same principle, it has been held that a devise to a person and the heirs of his body is not controlled or modified by the addition of words pointing at equality of division, as "equally to be divided," "share

and share alike," &c., which merely shew that the testator had an erroneous impression of the course of devolution under an estate tail, or had conceived the impracticable project of changing such course. *Jesson* v. *Wright*, 2 Bligh, 1; *Doe* v. *Featherstone*, 1 Barn. & Adolp. 944. AMBIGUITIES, PAROL EVIDENCE.

Still it is not to be denied that words ambiguous in themselves will yield to subsequent expressions clearly intended to have an explanatory or modifying effect. *Crone* v. *Odell*, 1 Ball & Bea. 449, S. C. in Dom. Proc. 3 Dow, 61. See also *Roe* v. *Avis*, 4 Durn. & East, 605.

Where the uncertainty is palpable on the face of the will, it is styled an ambiguity patent, and is irremoveable by parol evidence; because, to admit such evidence for the purpose of explaining what the will itself has left uncertain, would be to set up a nuncupative will in disregard of the enactment in the statute of frauds, which has subjected such wills to special regulations, and would be no less repugnant to general principles of law governing the construction of written instruments. In regard to no doctrine, therefore, have the Courts evinced more steadiness and consistency of determination than in the rejection of parol evidence to clear up ambiguities apparent on the face of the will, whether offered to supply omissions, remove redundancies, or induce the tranposition or change of words or clauses, or the giving to them a strained signification. *Lord Cheney's case*, 5 Rep. 68; *Strode* v. *Falkland*, 3 Ch. Rep. 98; *Bertie* v. *Falkland*, 1 Salk. 232; *Lord Walpole* v. *Earl of Cholmondeley*, 7 D. & E. 138; *Doe* v. *Oxenden*, 3 Taunt. 147, S. C. 4 Dow, 65; *Doe* v. *Greening*, 3 M. & S. 171; *Doe* v. *Lyford*, 4 M. & S. 550; *Miller* v. *Travers*, 1 Moo. & Scott, 342; in relation as well to personal as to real estate. *Ulrich* v. *Litchfield*, 2 Atk. 372; *Mounsey* v. *Blamire*, 4 Russ. 384. Thus, if a testator devises to one of the sons of A., evidence cannot be received to shew which of the sons was intended; and hence the devise is necessarily void. See 2 Vern. 624, 625; T. Raym. 82. And where a testator gave a legacy of 300*l.* to the children of his late cousin E. B., evidence was rejected of the testator having declared that the bequest should apply exclusively to E. B.'s children by one husband, since it would, by the general rule of construction, extend to both classes of children. *Hampshire* v. *Peirce*, 2 Ves. sen. 216. Patent ambiguities not removeable by parol evidence.

So, if a testator wholly omits the name of the devisee or legatee, it is impossible to supply the omission by parol evidence. *Wynne* v. *Littleton*, 2 Ch. Cas. 51; *Baylis* v. *Attorney-General*, 2 Atk. 240. But in some instances of personal legacies, Courts of equity have gone very far in admitting such evidence in aid of defective descriptions, as where the Christian name was omitted, the bequest being to —— Price, son of —— Price (*a*); *Price* v. *Page*, 4 Ves. 680; or the initial letters only of both Defective descriptions aided by parol evidence.

(*a*) In *Colpoys* v. *Colpoys*, Jacob, 465, Sir *T. Plumer*, M. R., referred to this case as contradicting the position, that parol evidence is not admissible to explain a patent ambiguity. It is submitted, however,

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christian name and surname were given, the bequest being to W. G. and Mr. S. G.; *Abbott* v. *Massie*, 3 Ves. 148; but a bequest to Lady —— has been held to be too defective to be supplied. *Hunt* v. *Hort*, 3 B. C. C. 311. The models of a sculptor have been held to pass by the contraction, "mod." *Goblet* v. *Beechy*, Hil. Term, 1829, *cor.* Sir *L. Shadwell*, V. C. *Vide* Mr. Wigram's Obs.

Latent ambiguities may be removed by parol evidence.

Where, however, the ambiguity is not apparent on the face of the will, but wholly arises out of the circumstances disclosed by the extrinsic evidence, it may be removed by evidence of the same nature; which, in effect, is merely to say that the *whole* of the parol evidence, and not part only, is to be received. Thus, if a testator devises Blackacre to his grandson John, and, upon investigation, it turns out that the testator has two closes called Blackacre, or two grandsons named John, evidence may be adduced to shew which of the closes or which of the grandsons is intended. *Jones* v. *Newman*, 1 Sir W. Blackst. 60; *Careless* v. *Careless*, 1 Mer. 384.

And, if it turned out that the testator had no grandson John, but two grandsons, respectively named Robert and William, it seems that either of these might support his claims by parol evidence; for, where some particulars in the testator's description apply to one, and some to the other, extrinsic evidence will be let in for the purpose of aiding the discovery of the actual intention.

Uncertainty produced by plurality of objects of equal pretensions.

Where there are two objects of exactly equal pretensions, whether more or less nearly answering to the description, as where the gift is to the testator's cousin, John, and there are two cousins John, or two cousins named William and Samuel, and no John, and the evidence fails to establish any superiority of claim in either, such equality is necessarily fatal to the pretensions of both. *Dowset* v. *Sweet*, Amb. 175; *Doe* v. *Joinville*, 3 East, 172.

Evidence not admitted where no doubt is raised as to the intention.

It should be observed, that, in these cases, evidence of circumstances throwing light on the testator's intention is always to be preferred to that of his oral declarations; and, where they leave no doubt of the intention, evidence of such declarations is not admissible. And therefore, in a recent case, where a testator gave a legacy to a public charity, the title of which applied to one institution, and the locality to another, the Court, in deciding on their conflicting claims, admitted evidence of one having received the support and patronage of the testator, at and subsequently to the making of his will, but rejected the evidence of the drawer of the will, as to the testator's oral intimation of his actual intention. *Capel* v. *Robarts*, 3 Hagg. 156.

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that the ambiguity is latent; for, until the extrinsic evidence has ascertained whether more persons than one of that surname were known to the testator, it cannot be pronounced whether the gift is ambiguous or not.

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The principle on which the evidence was rejected in the last case, seems to be that, coupling the will and the circumstances together, there was no ambiguity warranting the admission of parol evidence; and hence it agrees with and illustrates the point next to be noticed, namely, that where there is a subject or object of the devise answering to the description in the will, it is not allowed to be shewn that another subject or object not so completely answering to it was intended, the effect of which would be to contradict the will. *Delmare* v. *Robello*, 1 Ves. jun. 412; *Holmes* v. *Custance*, 12 Ves. 279; *Doe* v. *Westlake*, 4 Barn. & Ald. 57. And, even where there is no competition, it seems difficult to admit parol evidence in support of the claims of one to whom no part of the description applies, though authority for its admission, even in such a case, is not wanting; for, in one instance, by the help of such evidence, a person named Gertrude Yardley was allowed to take a legacy bequeathed to Catherine Earnley. *Beaumont* v. *Fell*, 2 P. W. 141.

Evidence of extrinsic facts, for what purpose admissible.

It is to be observed, that though, as we have seen, evidence is not admissible of the testator having attached any peculiar or extraordinary meaning to words of description, yet, where they refer (as indeed almost every description necessarily does) to some extrinsic fact, evidence may be resorted to for the purpose of ascertaining whether any given subject or object is within the words; in short, (to adopt the pithy language of Lord *Thurlow*, in *Jeacock* v. *Falkener*, 1 B. C. C. 295), "although evidence cannot be read to prove what the testator meant by the words used in his will, yet it may as to facts upon which the testator made his will." *Doe* v. *Collins*, 2 Durn. & East, 498; *Goodtitle* v. *Southern*, 1 Mau. & Selw. 299; *Sanford* v. *Raikes*, 1 Mer. 646; *Doe* v. *Earl of Jersey*, 1 Barn. & Ald. 550, 3 Barn. & Cress. 870; *Ongley* v. *Chambers*, 8 J. B. Moore, 665. Thus, where a person devises his estate at Ashton, though parol evidence is inadmissible to shew that he intended more or less to pass under this denomination than the words properly embrace, yet resort may, and indeed must, be had to such evidence, for the purpose of ascertaining whether any particular field composes part of the testator's Ashton estate.

So, if a testator bequeaths a legacy to a servant, if in his service at the time of his decease, evidence may be adduced to shew that the claimant was in his service at that time; and for this purpose the testator's conduct towards the claimant, and even his declarations respecting the legacy, might be material as elucidating the fact, that the testator considered the legatee to be in his service. *Herbert* v. *Reid*, 16 Ves. 481.

Again, where a testator bequeaths a specific legacy of stock, in terms which do no not accurately designate any of the existing public stocks, the state of his property in the funds when he made the will is admissible, as throwing light on his probable intention. *Dobson* v. *Waterman*, 3 Ves. 308, n.; *Selwood* v. *Mildmay*, Id. 306; *Penticost* v. *Ley*, 2 Jac. & W. 207. See also *Stafford* v. *Horton*, 1 B. C. C. 482. And such in-

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quiries have been sometimes directed with more doubtful propriety in elucidation of general stock legacies. *Fonnereau* v. *Poyntz*, 1 B. C. C. 473; *Colpoys* v. *Colpoys*, Jacob, 451.

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XII. OPERATION OF A GENERAL DEVISE UPON TRUST ESTATES, REMAINDERS, AND REVERSIONS, LEASEHOLDS, COPYHOLDS, AND AS AN EXECUTION OF POWERS.

Trust estates pass by a general devise, when.

Trust estates will pass by a general devise (*a*), provided there be nothing in the purposes and objects of the devise to raise an inference of a contrary intention. Thus, if a testator devises all his hereditaments or real estate simply to one or more persons in fee, for his, her, or their own use and benefit, such devise will carry freeholds or copyholds, of which the inheritance is in the testator in the character of trustee or mortgagee. See *Littleton's case*, 2 Vent. 351; *Ex parte Sergison*, 4 Ves. 147; *Attorney-General* v. *Buller*, 5 Ves. 339; *Lord Braybroke* v. *Inskip*, (a leading case), 8 Ves. 417.

But, if the devise be to uses to prevent dower, to uses in strict settlement, or subject to executory limitations, or creates a general trust or charge for the payment of the testator's debts, legacies, or any other monies, the trust or mortgage estates will not pass; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Roe* v. *Reade* (a leading case), 8 D. & E. 118; *Ex parte Morgan*, 10 Ves. 101; *Re Horsfall*, 1 M'Clel. & You. 292; and of course the same negative doctrine would apply to a devise in trust for sale, though it has been held that such a devise will pass lands contracted to be sold, which may be considered for some (though, as this case shews, not for all) purposes as trust estates. *Wall* v. *Bright*, 1 Jac. & W. 494. There is greater inconvenience in permitting estates of this description to get into the hands of an infant heir, than even trust estates strictly so called; because the late act of 1 Will. 4, c. 60, ss. 16 & 17, (*ante*, Vol. 6, p. 438), requires a purchaser to obtain a decree in equity for the specific performance of the contract, before an order can be granted for the infant heir of the vendor to convey.

As to estates contracted to be sold.

Tenancy in common.

It seems that the circumstance of the devisees being made tenants in common will not alone exclude trust estates, though this is not a usual or convenient mode of devising such estates. *Ex parte Whiteacre*, Rolls, July, 1807, 1 Sand. Us. & Tru. 285.

Whether infan-

It has never been decided whether the infancy or coverture of the

(*a*) It may prevent misapprehension, to explain once for all, that, throughout this section, a *general* devise means a devise not expressly including or excluding property of the particular description in regard to which the question is raised.

devisee at the time of the making of the will, would have an excluding effect. Some of Lord *Eldon's* reasoning in the case of *Lord Braybroke* v. *Inskip*, 8 Ves. 417, might seem to favour the affirmative conclusion; but there is much objection to allowing the construction to be influenced by extrinsic circumstances; and in the case of *King* v. *Denison*, 1 Ves. & Bea. 275, the same learned Judge declined to make the coverture and infancy of the devisees a ground for holding them to take beneficially. This case seems to furnish an analogous principle.

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cy or coverture a ground for excluding trust estates.

Express devises of estates held as trustee or mortgagee are now inserted as a matter of course in every regularly drawn will. Sometimes the will of a trustee affords a convenient mode of bringing home the legal estate. As, where a mortgagee in fee has been paid off without executing a reconveyance, he might by his will, instead of vesting the estate in a trustee for the mortgagor, devise it directly to the latter. Advantage may sometimes be taken of this suggestion, where it is desired to convey the estate to a *cestui que trust* without disclosing the trust. For instance, suppose a trustee for sale purchases the trust estate, (a transaction which is often morally fair, though indefensible at law), and a third person, probably a relation, is made the nominal purchaser, a devise in the will of the latter would have the effect of vesting in the most convenient manner the estate in the real purchaser.

Suggestion as to devising legal estate to *cestui que trust*.

Remainders or reversions in fee will pass under a general devise of lands; and the later cases have strongly inclined to the establishment of the rule, that the inapplicability of *some* of the limitations of the devise to a remainder or reversion forms no ground for its exclusion (*a*). Thus, if lands are settled to the use of A. for life, with remainder to his first and other sons in tail male, with remainder to A. in fee; and A., by his will, devises all his lands to his first and other sons in tail male, with remainder to his daughters in tail, the remainder in fee will pass by the will; for, though the devise to the sons could not operate on it, the devise to the daughters might. *Church* v. *Mundy*, 15 Ves. 396; *Doe* v. *Bartle*, 5 Barn. & Ald. 492; which have overruled *Roe* v. *Avis*, 4 D. & E. 605; see *Strong* v. *Teat*, 2 Burr. 912, 3 B. P. C. Toml. ed. 219; *Goodtitle* v. *Miles*, 6 East, 494, 2 Ves. & Bea. 187. And the effect would be the same if the devise was of the testator's lands "not settled," *Cooke* v. *Gerrard*, 1 Lev. 212, or lands not in settlement; because these words are construed to refer to the estates affected by the settlement, and not

Remainders and reversions pass by a general devise, when.

(*a*) It is obvious, that more than one of the points discussed in this section might concurrently arise; for instance, a testator might have a remainder in the character of trustee, in which case the operation of his devise would depend upon the rule of construction applicable both to trust estates and remainders.

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to the corpus of the lands, *i. e.* as if the testator had said, I give all my lands, except the estates therein which are vested in other persons by settlement. *Strode* v. *Lady Falkland*, 2 Vern. 621, S. C. *nom. Falkland* v. *Litton*, 3 B. P. C. Toml. ed. 24. See also *Chester* v. *Chester*, 3 P. W. 56; *Glover* v. *Spendlove*, 4 B. C. C. 337; *Attorney-General* v. *Vigor*, 8 Ves. 256.

Immediate charges inoperative to exclude reversions.

So, where a testator, having a reversion or remainder in fee, makes a general devise of his lands, giving thereout a life annuity to a person who is already tenant for life of such lands, this annuity will not prevent the reversion or remainder from passing by the devise. *Doe* v. *Weatherby*, 11 East, 322; *Doe* v. *Fossick*, 1 Barn. & Adolph. 186.

Immaterial whether the testator has other lands.

It should be observed, that the circumstance of the testator having or not having other lands on which the limitations or charges, inapplicable to the remainder or reversion, may operate, does not exert any influence on the rule of construction in question. If he had other lands, then *all* the limitations will take effect as to such other lands, and the applicable limitations only in regard to the remainder or reversion, *reddendo singula singulis;* if he had no other lands, the argument for including the remainder or reversion acquires increased force, for (as observed by Lord *Eldon* in *Church* v. *Mundy*), "since there is no other subject to which the words can be applied, the testator must, if he does not mean that, be considered as having no meaning."

Leaseholds for years pass under a general devise, when.

Leaseholds for years will not pass under a general devise of lands (*a*), if the testator had freeholds when he made his will, on the ground, it should seem, that the words are to be taken in the first instance *in digniori sensu*, and are not to be extended to any inferior or less appropriate subject, unless the devise, if not so extended, would be wholly inoperative. *Rose* v. *Bartlett*, Cro. Car. 292; *Davis* v. *Gibbs*, 3 P. W. 26; *Knotsford* v. *Gardiner*, 2 Atk. 450; *Thompson* v. *Lady Lawley*, 2 Bos.

Immaterial whether devise is of messuages or lands, &c.

(*a*) It is immaterial, in regard to the application of the doctrine in question, whether the words of the devise are more or less comprehensive; for instance, the question, whether a leasehold messuage passes under a devise of all the testator's messuages, will be governed by precisely the same principle as the question, whether a leasehold close of land passes under a devise of all the testator's lands, and so with respect to local limits. Thus, a devise of lands at F. will pass leaseholds at F., if the testator has no freeholds there, but not if he has. *Ross* v. *Ross*, 1 Eq. Ca. Ab. 124, pl. 14; *Chapman* v. *Hart*, 1 Ves. sen. 271. But it has been decided, that where a testator devises all his *farms*, lands, &c., a farm composed of freehold and leasehold lands let at an integral rent, will pass. *Lane* v. *Stanhope*, 6 Durn. & E. 345. See also *Doe* v. *Lucan*, 9 East, 448.

"Farms," how construed.

& Pull. 303, where the anterior cases are fully commented upon by Lord *Eldon* (*a*).

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And the circumstances that the will is incapable of operating on freeholds for want of an attestation, and that it contains no other clause under which the leasehold property could pass if not by this, do not warrant a variation in the construction. *Chapman* v. *Hart*, 1 Ves. sen. 271. See also *Sampson* v. *Sampson*, 2 Ves. & Bea. 337.

Rule as to unattested wills.

In the two cases just cited, the question related not to leaseholds but to copyholds not surrendered to the use of the will, which were subject to a similar rule before the stat. of 55 Geo. 3, c. 192, (stated *ante*, Vol. 3, p. 533); which, by dispensing with such surrenders, has placed copyholds on an equal footing with freeholds. *Doe* v. *Ludlam*, 5 Moore & Pay. 48, S. C. 7 Bing. 275. Whether the ownership of copyholds has the same effect as of freeholds in excluding leaseholds, is a point which has not yet arisen.

Copyholds pass by a general devise.

Other questions, equally untouched by decision and equally doubtful upon principle, are, whether the fact of the testator's having, when he made his will, freehold lands of inheritance, as trustee or mortgagee, or a power of appointment of which the devise would be an exercise, forms a ground for the exclusion of leaseholds to which he is entitled beneficially (*b*). The former question, of course, could only arise where the devise was such as would operate on trust estates, (*vide ante*, p. 158), and the latter where the will was executed in the manner the power required: the technical reasoning on which the doctrine evidently stands would seem to lead to the affirmative conclusion in regard to all the suggested points; but its extension to them would have to encounter the dislike to the rule produced by the conviction that the construction which excludes leaseholds from a general devise disappoints the intention; as a testator commonly uses the words messuages, lands, or hereditaments, in reference rather to the corpus of the property than to the nature or quantity of his interest in it; which consideration has sometimes induced a departure from the construction on very slight grounds, such as that of the devise being of the lands of

Undecided points suggested.

(*a*) It is a general rule, not limited to this class of cases, that where there are two subjects, one more precisely answering to the terms of a given description than the other, the devise will be confined to the former, though it might have embraced the latter if it had been the only subject, *ut res magis valeat quam pereat*. *Roe* v. *Bell*, 8 D. & R. 579; *Wills* v. *Sayers*, 4 Madd. 409; *Doe* v. *Roberts*, 5 Barn. & A. 407.

(*b*) Of course, it would form a ground for excluding leaseholds possessed by the testator as trustee or mortgagee; but, as an assignment of them might always be obtained from the executors or administrators, the question as to them does not arise.

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which the testator is *possessed*—this being a word more appropriate to personal than to freehold interests; *Addis* v. *Clement*, 2 P. W. 456; a ground of determination which Lord *Eldon* considered to be very refined; (see 2 Bos. & Pull. 313); though the present Master of the Rolls seems to have lent some countenance to it in a recent case. See *Dixon* v. *Dawson*, 2 Sim & Stu. 327.

Effect of words of limitation being introduced applicable to personalty.

The use of words of limitation applicable to both real and personal estate seems to be rather a stronger ground for including leaseholds than the circumstance just adverted to; but no decision has gone the length of averring its adequacy: for, in the late case of *Dixon* v. *Dawson*, 2 Sim. & Stu. 327, where such words occurred, the Vice Chancellor relied more on the evidence of intention drawn from the entire will than upon the words of limitation. At all events, it is clear that leaseholds will not pass under a devise of real estate to trustees, their *executors or administrators*, in trust for certain persons *and their heirs*. *Whitaker* v. *Ambler*, 1 Eden, 151. Where a testator devised all his lands, tenements, and hereditaments to trustees, their heirs, executors, administrators, and assigns, according to their several and respective estates and interests therein; and the testator, in another part of the will, declared that the rents were to be subject to ground rents and other outgoings; it was held that the devise embraced leaseholds as well as freeholds. *Hartley* v. *Hurle*, 5 Ves. 540.

Whether inadequacy of freeholds to bear a charge sufficient.

It seems to have been considered that the circumstance of the devise being subject to a charge which the freeholds alone were inadequate to bear, authorized its extension to copyholds. *Doe* v. *Lucan*, 9 East, 448. If this point can be maintained, the inadequacy must be proved to have existed at the time of making the devise.

Powers exercised by a general devise, when.

The remaining question is, whether a general devise will operate as an execution of powers over real estate. This depends on the same fact which determines the applicability of such a devise to leaseholds, namely, whether there is any other subject for its operation. Thus, if a testator devises all his real estate, and it turns out that he had no real estate at the time, but that he had a testamentary power over real estate, the devise will operate as an appointment under the power, notwithstanding that the testator has, by the same will, expressly exercised other powers vested in him. *Attorney-General* v. *Vigor*, 8 Ves. 256; see also *Standen* v. *Standen*, 2 Id. 589 (*a*). On the other hand, if the testator has real

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General devise which would operate on real estate not necessarily sufficient to exercise power.

(*a*) Still, however, it does not follow that every devise which would, from the generality of its terms, comprise real estate belonging to the testator, if there had been any such, would operate as an execution of a power. Thus, where a testator by a will, attested by three witnesses, devised all his estate and effects of whatever denomination, Sir *T. Plumer*, M. R., held, that though these words would have passed any real estate

CONSTRUCTION OF A GENERAL DEVISE.

estate upon which the will operates, (or rather upon which it might have operated, for, of course, the failure of the devise from circumstances subsequent to the execution would not vary the construction), it will be presumed that the devise was made with a view to that property, and not as an exercise of the power; *Sir Edward Clere's case*, 6 Co. 17 b; *Ex parte Caswall*, 1 Atk. 559; even though the terms of description are rather more comprehensive than is required to embrace the testator's own property; as where a testator devised all his "messuages, *lands, tenements, and hereditaments*," though it turned out that the property of the testator consisted of houses only, yet it was held that the power was not exercised. *Hoste* v. *Blackman*, 6 Madd. 190. Where a testator, who had freeholds but not copyholds, and a power over both, devised his freehold and copyhold estates, it was held that the devise operated as an execution of the power in respect of the copyholds but not of the freeholds. *Lewis* v. *Llewellyn*, Turn. & Russ. 104. It has been decided that a general devise of all the *lands* which the testator had power to dispose of did not extend to monies to arise from the sale of lands, over which *monies* the testator had a disposing power. *Adams* v. *Austen*, 3 Russ. 461.

Devise of lands in A., when it operates as an appointment.

The principles applicable to general devises extend to devises of land circumscribed by locality. Thus, if a testator devises all his lands in the parishes of A. and B., having lands in A. only, and a power over other lands in A., and also over lands in B., the devise will execute the power over the lands in B. but not the power over those in A. *Napier* v. *Napier*, 1 Sim. 28. And, in a case which underwent much discussion, and was eventually decided by the House of Lords, where A., being seised in fee of an undivided moiety of lands in Surrey, the other moiety in which had been limited to her for life, remainder to such uses as she by deed or will should appoint, devised all her freehold estates in the county of Surrey, this devise was held to be satisfied by embracing the first moiety, and did not operate as an appointment of the second. *Roake* v. *Denn*, 4 Bligh, P. C. New Ser. 1. See also *Doe* v. *Roake*, 2 Bing. 497; *Denn* v. *Roake*, 5 Barn. & Cress. 720.

General bequest does not exercise power over personalty.

The ground for reading a general devise as an appointment, it will be observed, is confined to real estate, (every devise of which, expressed in terms either general or particular, is specific), and does not apply to personalty; for, as a will of personal estate comprises whatever a testator *dies* possessed of, it is not necessarily to be presumed that he had any specific property in his view when he made it; and therefore, even if it

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of which the testator might have happened to be seised, they did not demonstrate an intention to exercise a power over real estate. *Jones* v. *Curry*, 1 Swanst. 66.

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should appear that the testator had no other disposable property at the time of the making of his will or at his death, (*Molton* v. *Hutchinson*, 1 Atk. 558; *Buckland* v. *Barton*, 2 Hen. Black. 136; *Langham* v. *Nenny*, 3 Ves. 467; *Croft* v. *Slee*, 4 Ves. 60; *Bradly* v. *Westcott*, 13 Ves. 445), or that the exclusion of the subject of the power will leave the residuary clause nothing to operate upon, or render the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an exercise of the power. *Andrews* v. *Emmot*, 2 B. C. C. 297; *Bennett* v. *Aburrow*, 8 Ves. 609. And the circumstance that the donee, being a married woman, has no general testamentary capacity, (but who, let it be remembered, might have separate estate disposable by will), has been held to form no ground for varying the construction. *Lovell* v. *Knight*, 3 Sim. 275.

What denotes intention to exercise power over personalty.

And though an intention to exercise the power may be collected by implication from the whole instrument; *Hunloke* v. *Gell*, 1 Russ. & Myl. 515; yet the bequest of a sum of money, corresponding in amount with that over which the power extends, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment, as he may have calculated on future accessions. *Jones* v. *Tucker*, 2 Mer. 533. For the same reason, a general bequest of personal estate, described as consisting of "money in the funds," &c. will not operate as an appointment of stock, though the testator had no stock of his own at the time. *Webb* v. *Honnor*, 1 Jac. & Walk. 352. On the other hand, the excepting of a definite portion of stock out of a particular fund (as "50*l.* out of my Bank Stock,") has been considered to mark an intention to include the residue of such stock in the general bequest. *Walker* v. *Mackie*, 4 Russ. 76.

Rule as to leaseholds.

The consideration that the testator, in designating a particular species of property, may have contemplated its future acquisition, applies no less to leaseholds than to any other subject of personal property; and yet, in a late case, an able living Judge declared his inability to discover "any solid ground upon which it is to be maintained that a gift of leaseholds, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of monies and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and, as to them, the will must refer to them as the subjects of the power, or they will not pass." *Per* Sir *J. Leach*, M.R., *Grant* v. *Lynam*, 4 Russ. 296.

Remarks on doctrine advanced in *Grant* v. *Lynam*.

The reasoning of the learned Judge loses sight of the consideration, that, as a general bequest of leaseholds would include after-acquired leaseholds, its insertion in a will raises no such inference that the testator had any specific property in his view at the time, as a devise of real estates, which can only comprise what the testator then had. Untenable, however, as the reasoning in this case is, yet the doctrine which it advances

seems to have been assumed in the subsequent case of *Lovell* v. *Knight*, 3 Sim. 275, where the question discussed was, whether a gift of "real property" was not tantamount in point of construction to a gift of leaseholds, being chattels "real," so as to render the devise an exercise of the power. The negative was decided, and therefore the ground for applying the doctrine in question failed.

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It ought to be observed, that any peculiarity of execution, not requisite in the case of an ordinary will, would not shew an intention to execute the power, unless accompanied by some internal evidence of such intention. See *Jones* v. *Curry*, 1 Swanst. 66. This rule agrees with the doctrine well established, that a will expressed in terms applicable to personalty is not to be strained into a devise of freehold estate, because attested by three witnesses. (See cases cit. 2 Jarm. Pow. Dev. 158). Nor, on the other hand, will a general devise, which, by the ordinary rules of construction, would embrace real estate, be diverted to less appropriate subjects on account of the will not being attested so as to pass freehold estates; *Chapman* v. *Hart*, 1 Ves. sen. 270; *Sampson* v. *Sampson*, 2 Ves. & Bea. 337; which class of cases seems to establish the general principle, that the construction of an instrument is not to be in any manner influenced or affected by the circumstances of its execution.

Peculiarities of execution do not vary the construction.

Having regard to the inefficacy of a general bequest of personalty to exercise powers over property of this description, many practitioners introduce into their common forms of such bequests words extending them to any personal estate over which the testator has a disposing power; which, it is clear, would exercise all the general powers over personalty that might happen to be vested in him, provided the instrument were sufficient in point of execution. This seems better than directing inquiries respecting the existence of powers in each particular case, and might usefully be applied to devises of real estate. In fact, the suggestion may extend to all the particulars which have formed subjects for consideration in the present section, namely, trust estates, remainders, reversions, leaseholds, and the execution of powers, which should be expressly included in devises that are intended to embrace them.

Suggestion as to referring to powers in residuary bequests.

XIII. VESTING.

VESTING OF REALTY.

1. *As to the Vesting of Interests in real Estate.*
2. *Pecuniary Charges on Land.*
3. *Personal Legacies.*
4. *Residuary Bequests.*

1. *As to the Vesting of Interests in real Estate.*

The law is said to favour the vesting of estates; the effect of which principle seems to be, that property, which is the subject of any disposition

General doctrine respecting vesting.

VESTING OF REALTY.

by deed or will, will belong to the object of gift immediately on the instrument of conveyance taking effect, or so soon afterwards as the terms thereof will admit of. As a will takes effect at the death of the testator, it follows that an estate devised to a person then in *esse* simply, (*i. e.* without any expression of an intention to suspend or postpone its operation), vests in the devisee immediately on the death of the testator. Where words of futurity are introduced into the gift, it becomes necessary to determine whether they are inserted for the purpose of protracting the vesting, or point to the deferred possession or enjoyment only; and herein commonly consists the debateable ground.

Where the testator creates a particular estate, and afterwards disposes of the ulterior property in the event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring to the possession or enjoyment only, which the antecedent gift has pre-occupied, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B., between whom the entire fee simple is parcelled out, are alike vested at the death of the testator, the only difference being that the estate of the one is in possession and that of the other is in remainder.

Remainder in default of object of prior estate not contingent.

It may be statedas a general rule, that where a remainder is created *in default* or *for want* of the object of the preceding estate, these words do not render the remainder contingent, and thereby subject it to be defeated in the event of the prior devisee coming into existence; but such remainder is a vested interest absolutely expectant on the determination of the prior estate. Thus it has been held, that where lands are devised to the first and other sons successively of A. in tail, *and in default of such sons* to the daughters in tail, the devise to the daughters takes effect although A. has sons, they dying without issue. *Doe* v. *Dacre*, 1 Bos. & Pull. 250, S. C. B. R. 8 Durn. & E. 112.

Again, where a testator devised to E. for life, and after her decease to the first and every other son of her body lawfully begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held that the devise to M. was a vested remainder expectant on the determination of the prior life estates to E. and her sons and daughters, and those estates having failed *by the death of E.'s only daughter*, it fell into possession. *Goodright* v. *Jones*, 4 Mau. & Selw. 88.

So, where a testator devised certain lands to D. for life, remainder to a trustee to preserve contingent remainders; remainder to the first and other sons of D., and their heirs, *and for want of such issue* to J. for life; with remainders over; it was held that the effect of the devises to the sons of D. was to give them successive estates tail, with a vested remainder over. *Lewis* v. *Waters*, 6 East, 336.

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Devises of reversions and remainders.

And here it may be noticed, that where a person, who is entitled to a reversion or remainder in fee expectant on an estate tail in himself, by his will devises the lands after his decease, or in the event of his dying without issue, this is construed as an immediate gift of the testator's reversion or remainder; though upon the face of the will the devise presents the aspect of an executory gift to arise on a general failure of issue, which would clearly be void. *Badger* v. *Lloyd*, 1 Lord Raym. 523, S. C. 1 Salk. 232.

If the contingency described precisely corresponds with the event which determines the existing estate tail, no difficulty can arise in applying this rule of construction; but it frequently happens that the terms used by the testator are not quite in unison with the event in question, as where the testator refers to issue generally, and the subsisting estates are restricted to issue of a particular marriage or sex. In such cases there might seem to be a strong ground to contend that the want of correspondence amounts merely to an inaccuracy in the description of the reversion or remainder, and does not indicate that a different interest was in the testator's contemplation; and some well-known cases have been decided on this principle; *Wellington* v. *Wellington*, 1 Sir W. Bl. 645, S. C. 4 Burr. 2165; *French* v. *Caddell*, 3 B. P. C. Toml. ed. 257; *Jones* v *Morgan*, Fea. C. R. 329; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409; yet a modern decision in the House of Lords favors a more rigid construction. *Banks* v. *Holme*, 1 Russ. 394, n. Lord *Eldon's* strictures upon this case in *Morse* v. *Lord Ormonde*, 1 Russ. 405, lead to the suspicion, that the decision of the House did not coincide with his own opinion, though it must have taken place while his Lordship held the great seal. It certainly exacts from testators more of technical correctness than it has been usual to require.

Devises seemingly contingent construed to be vested.

We now return to the consideration of devises creative of an interest expectant on the determination of a prior estate, for the sake of which, and not with the design of postponing the vesting, the gift is made to assume the form of a future disposition. This construction obtains, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age to A. in fee, this is construed as conferring on A. a vested estate in fee simple, subject to the prior chattel interest given to the trustees; and, consequently, on A.'s death under the prescribed age, the property descends to his heir-at-law; (cases from *Boraston's case*, 3 Rep. 19, down to *Warter* v. *Hutchinson*, 5 J. B. Moore 143, S. C. in B. R. 1 Barn. & Cress. 711); and it is not essential that the estate of the trustees should have been (though commonly it has hap-

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pened to be) created for the benefit of the ulterior devisee. *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4.

Words of contingency explained by the context.

Another instance of words of contingency introduced into a devise in remainder being referred to the possession or enjoyment only, occurs where such words being literally construed would seem to require that the prior estates should have determined in a given order; as, where lands were devised to A. in tail, with remainder to B. for life, and the testator subsequently declared, that, if A. died without issue, "*and B. be then deceased,*" he devised to C. and his heirs, it was held that these words were merely put in to express the testator's meaning that B. should be sure to have it for life, and not to defeat the devise over in the event (which happened) of B. surviving A. *Anon.* 2 Vent. 363. See also *King* v. *Rumball*, Cro. Jac. 448; *Chadock* v. *Cowley*, Id. 695; *Fortescue* v. *Abbott*, Pollex. 479; *Pearsall* v. *Simpson*, 15 Ves. 29; *Massey* v. *Hudson*, 2 Mer. 138; which compare with *Holmes* v. *Cradock*, 3 Ves. 314.

Words of contingency in general to have full effect.

Subject, however, to these few excepted instances, in which the apparently contingent terms of the gift are explained by the context to be otherwise intended, the general rule is, that expressions which make a gift contingent, like every other part of a will, are to be allowed their full effect, and the devisee or legatee can take nothing unless the prescribed event happens, however plausible may be the conjecture that the testator did not rightly apprehend the import or operation of the words he has used. *Denn* v. *Bagshaw*, 6 Durn. & E. 512; *Holmes* v. *Cradock*, 3 Ves. 317; *Shuldam* v. *Smith*, 6 Dow, 22.

So, where a testator, reciting that he has a power of disposition in a certain event, exercises such power accordingly; if it should turn out that the event described does not happen, the gift will not take effect, though it should appear that the testator's power was larger than he imagined, and would have enabled him to dispose of the property in the event which did happen. *Doe* v. *Wilkinson*, 2 D. & E. 209. But where a literal adherence to the contingent terms of a gift will defeat a purpose not merely conjectured but actually expressed by the testator, the gift will be moulded into a consistency with such expressed purpose. *Bradford* v. *Foley*, Doug. 63.

Whether contingency affects one or more estates.

In framing a series of limitations in a will, one of which is clearly made contingent, it should be explicitly shewn whether the contingency extends to all the after-limited estates, or is confined to the estate with which it is immediately associated; more especially, if the intention does not coincide with the rule, that rule being, that, if no purpose is expressed distinguishing the estate in question from those which follow, the whole series will be considered as hinging on the contingency. *Davis* v. *Norton*, 2 P. W. 390; *Doe* v. *Shephard*, Doug. 75; *Moody* v. *Walters*, 16 Ves. 283. In order to confine the contingency to the proximate estate, either the testator must have expressed a purpose concerning that estate

which does not apply to the others; *Napper* v. *Sanders*, Hutt. 119; *Bradford* v. *Foley*, Doug. 63; *Horton* v. *Whittaker*, 1 Durn. & E. 346; or the subsequent estates must be detached from the contingent limitation, in a manner evidently denoting a different intention with respect to those estates. *Lethieullier* v. *Tracy*, 3 Atk. 774, S. C. Amb. 204; and see *Aislabie* v. *Rice*, 3 Madd. 265, S. C. 3 Moore, 358. (Compare these cases with *Doe* v. *Wilkinson*, 2 Durn. & E. 209).

Whether original vesting is postponed or the estate is liable to be divested.

Sometimes a gift is expressed in terms which render it difficult to collect whether it is to vest immediately, with a liability to be divested at or on some future period or event, or whether it is originally made contingent until such period or event. To this description belong the numerous cases in which a gift over has been held to explain and neutralize the words of contingency introduced into the preceding original gift. As, where lands are devised to a person, *if or when he attains a certain age*, with a devise over in the event of his dying under that age; the devise over is held to be explanatory of the sense in which the preceding expressions importing contingency were used, namely, as pointing out when the estate of the devisee is to become absolute; and those expressions, therefore, do not postpone the vesting. *Edwards* v. *Hammond*, 3 Lev. 132, 1 Bos. & Pull. New Rep. 324, n.; *Doe* v. *Moore*, 14 East, 61; *Doe* v. *Nowell*, 1 Mau. & Selw. 327, 5 Dow, 202. And the principle is not varied by the circumstance of another event being combined in the divesting clause with those which are introduced into the original gift, as in the case of a devise to A. if he shall attain the age of twenty-one years, and in case he shall die before he attains such age, and his brother shall survive him, then over. *Bromfield* v. *Crowder*, 1 Bos. & Pull. New Rep. 313.

Estate not divested unless all the prescribed events happen.

Where a gift originally vested is to be divested in favour of another devisee on the happening of several events, or rather of an event composed of several circumstances, the original gift will remain undivested, unless all the prescribed circumstances concur. Thus, if lands are devised to A. and his heirs, and if he shall die under the age of twenty-one years *and* (*a*) without issue, then to B. in fee; if A. attains twenty-one, though he dies without issue, the lands devolve to his heir or devisee, his estate being undivested. *Walsh* v. *Peterson*, 3 Atk. 193. And this rule of construction applies in relation as well to circumstances which are personal to the substituted objects as to collateral events. Thus, where a fund was bequeathed to A. for life, and after her decease to B. and C. in equal moieties, and in case of the death of either of them in the life-

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(*a*) From some observations lately inserted in a respectable periodical law publication, it appears that the principle to which these cases are here referred does not obtain unanimous assent.

VESTING OF REALTY.

time of A., then the whole to the survivor *living at A.'s decease.* B. and C. both died in A.'s lifetime, and it was held that the original gift was not defeated. *Harrison* v. *Foreman,* 5 Ves. 207. Upon the same principle, it has been held that where a gift is made to A. for life, and after his death to his three children, *or such of them as shall be living* at A.'s decease, this is an immediately vested interest in the three children, subject only to be divested in favour of such of them as may happen to be living at the prescribed period (*Howes* v. *Herring,* 1 M'Clel. & You. 295); and if none of the legatees should be then in existence, (*i. e.* if all the three children of A. happen to die in his lifetime), the original gift to the whole remains undivested. *Sturgess* v. *Pearson,* 4 Madd. 411. See also *Bromhead* v. *Hunt,* 2 Jac. & Walk. 459. And the construction has been sometimes adopted where the will was less explicit on the point. *Browne* v. *Lord Kenyon,* 3 Madd. 410.

Whether substituted partial gift defeats prior gift *in toto.*

It seems to be a corollary from the doctrine of these cases, that, where the substituted executory gift is not co-extensive in point of interest with the prior gift, it defeats the latter *pro tanto* only. Such was evidently the opinion of Lord *Alvanley,* in the case of *Taylor* v. *Langford,* 3 Ves. 119, where A. by his will bequeathed the produce of his residuary estate to his two sisters, C. and D., share and share alike, during their natural lives, and after their decease the principal to be paid to their children; but whichever sister died before the other, then the share which was so paid to her should be paid to her children; but if such sister so dying *should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid.* A. having died without leaving children, it was contended that the first words completely disposed of the property, and the subsequent expressions were only applicable to the life interest of the sisters; and the decree in this instance, and former orders in the cause, proceeded on this principle.

Where a charge is imposed of two sets of legacies, respectively to arise in alternative events, the property will be liable to one or to the other set of legacies according to the event, but not to both. *Swayne* v. *Smith,* 1 Sim. & Stu. 56.

VESTING OF PECUNIARY CHARGES ON LAND.

2. *As to the Vesting of Pecuniary Charges on Land.*

Where payment is postponed for the convenience of the estate.

The same general principles which govern the vesting of real estates apply to pecuniary charges upon land payable *in futuro,* with respect to which one leading rule is, that, where the payment is postponed with a view merely to the circumstances of the estate, the vesting is immediate. As where lands are devised to A. for life, with remainder to B. in fee, charged with the payment to C. of 100*l.* within three months after the decease of A., the legacy to C., notwithstanding the postponement of payment, vests immediately at the testator's decease. Indeed, the reasoning which proves the estate of B. to be vested would apply with exactly equal force to C.'s le-

VESTING OF PECUNIARY CHARGES ON LAND.

gacy, which was evidently postponed for the purpose of creating an exemption from the charge in favour of the prior life estate, and not in order to render the ulterior gift contingent. *Lowther* v. *Condon*, 2 Atk. 127; *Dawson* v. *Killett*, 1 B. C. C. 119; *Poole* v. *Terry*, 4 Simons, 294. And the same construction prevails where lands are devised to A. for life, with remainder to trustees upon trust to sell, and out of the produce to pay certain sums of money; for, though the fund out of which the payment is to be made has no existence until the death of A., a circumstance on which undue stress has been sometimes laid, yet, as the sale is obviously deferred for the sake of letting in the prior life estate, both the remainder of the trustees and the beneficial interests in the produce of the sale vest instantly on the testator's decease. *Bayley* v. *Bishop*, 9 Ves. 6.

Where payment is postponed from the circumstances of the legatee.

If, however, the postponement be connected with and dependent on an event or circumstance personal to the object of the pecuniary gift, as where a testator charges his lands with the payment of 100*l.* to B., if or when he attains the age of twenty-one years, or gives to B. 100*l.* to be paid to him out of Blackacre upon his attaining the age of twenty-one years, (for such variations of expression, however important, as hereafter shewn in regard to personal legacies, are quite immaterial in reference to pecuniary charges on *real* estate), the legacy is contingent; and if B. dies before he attains his majority, the charge becomes extinguished in the land. *Lady Pawlett* v. *Lord Pawlett*, 1 Vern. 204; *Smith* v. *Smith*, 2 Vern. 92; *Jennings* v. *Looks*, 2 P. W. 276; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613.

A legacy, however, to be paid out of land when the devisee *of the land* attains a particular age, is evidently postponed for the convenience of the estate, in order that such devisee may, in the meantime, be free from the burthen, and therefore the death of the devisee of the money before the time of payment does not affect the charge. *Sherman* v. *Collins*, 3 Atk. 319 (*a*). And the same considerations obviously apply to a legacy out of land, which is directed to be paid within twelve months, or any other such definite period after the testator's decease. *Wilson* v. *Spencer*, 3 P. W. 173; *Cowper* v. *Scott*, Id. 119.

3. *As to the Vesting of Pecuniary Legacies.*

VESTING OF PERSONAL LEGACIES.

The vesting of personal legacies admits of some distinctions borrowed from the civil law, which have not obtained a reception in regard to real estate, being the result of doctrines introduced by the Ecclesiastical Courts, who possessed and still possess, concurrently with Courts of

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(*a*) Lord *Hardwicke* seems to have doubted whether the death of the devisee *of the land* before the age would not have defeated the legacy. But see *ante*, p. 94.

VESTING OF PERSONAL LEGACIES.

Equity, a jurisdiction over executors as well as administrators, (whose authority emanates from them), for the recovery of legacies, and distributive shares of personal estate.

Leading distinction.

One principal distinction applicable to pecuniary legacies is, that, where futurity is annexed to the *substance* of the gift, the vesting is in the meantime suspended; but, where the *time of payment* only is future, the legacy vests *instanter*. Thus, where a legacy is given to a person at the age of twenty-one years; *Onslow* v. *South*, 1 Eq. Ca. Ab. 295, pl. 6; *Cruse* v. *Barley*, 3 P. W. 20; or at the expiration of ten years from the decease of the testator; *Snell* v. *Dee*, 2 Salk. 415; the vesting, and not the payment merely, is deferred; and, consequently, if the legatee dies before the arrival of the period in question, the legacy fails. But, if the legacy is given to the legatee *to be paid* at the age of twenty-one years, or within ten years after the testator's decease, the legacy vests immediately, and the death of the legatee before the time of payment will not affect his title; *Cloberry* v. *Lampen*, 2 Ch. Cas. 155, 2 Freem. 24; *Stapleton* v. *Cheele*, 2 Vern. 673; *Harvey* v. *Harvey*, 2 P. W. 21; *Jackson* v. *Jackson*, 1 Ves. sen. 217 (*a*). A striking example of this construction occurs in the case of *Sidney* v. *Vaughan*, 2 B. P. C. Toml. ed. 254, where a testatrix bequeathed to A. 100*l.*, *to be paid* to him within six months after he should have served his apprenticeship, to which he was then bound. A. did not serve out his apprenticeship, but ran away from his master, and after the expiration of the term died intestate. It was held, by the House of Lords (confirming a decree of the Court of Chancery of the Glamorganshire Great Sessions), that A.'s administratrix was entitled to the legacy, with interest from the expiration of the six months.

Words of division or distribution.

Words directing future division or distribution between two or more objects would seem to fall under the same consideration as a direction to pay; and therefore, where following a gift which would otherwise confer an immediate interest, do not postpone the vesting. Thus, a bequest to A. and B. of 3000*l.* Navy 5*l. per cent.* Annuities, and all dividends and proceeds arising therefrom, *to be equally divided between them when they shall arrive at twenty-four years* of age, has been held to vest the stock immediately in the legatees. *May* v. *Wood*, 3 B. C. C. 478.

Legacy on uncertain event.

It seems, however, that even where the futurity is annexed to the payment or distribution only, yet, if such payment or distribution is deferred, not (as in the cases just noticed) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may

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Representative of deceased legatee, when entitled to receive pecuniary legacy.

(*a*) If no interest were payable on the legacy, the representative would be bound to wait until the legatee, if living, would have attained his majority; but, if it carried interest, he would be entitled immediately. See *Crickett* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. W. 271.

VESTING OF PERSONAL LEGACIES.

not happen, the effect is to render the legacy itself contingent. Thus, where a sum of 200*l.* was given to A., *to be paid* at her marriage, or three months afterwards, provided she married with consent, Lord *Hardwicke*, adverting to the distinction in question, held that A., having died unmarried, her representative could not claim the legacy. *Atkins* v. *Hiccocks*, 1 Atk. 500. But see *Booth* v. *Booth*, 4 Ves. 399, *post*, 176.

Rule where the only gift is in the direction to pay, &c.

It is to be observed, that, where the only gift is in the direction to pay or distribute, the case is not to be ranked with those in which the payment or distribution only is deferred, but is to be regarded as one in which time is annexed to the substance of the gift.

Thus, in a leading case, where a testator gave certain real and personal property to trustees upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of W. R. R., share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters at such age, or marriage with consent; and the trustees were authorized to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the meantime; Sir *W. Grant*, M. R. held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five. *Leake* v. *Robinson*, 2 Mer. 363.

So, where a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, *on the youngest attaining twenty-one years*, at her and my executor's discretion, such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;" Sir *J. Leach*, V. C., on the principle above stated, held that children who died before the youngest attained twenty-one took no interest. *Ford* v. *Rawlins*, 1 Sim. & Stu. 328.

Similarity in the rules governing the vesting of real and personal estate.

The difference which has been noticed to exist between the construction of devises and legacies must not be so magnified in the reader's apprehension as to induce the supposition that, in construing the latter, the principles governing the vesting of interests in real estate are wholly discarded. On the contrary, the distinction between future gifts which are, and those which are not preceded by a gift of the intermediate interest, justly deemed so important in determining the vesting of interests in real estate, may be traced through the cases fixing the construction of bequests of personalty. Thus, it is indisputably clear, that, where personal property is bequeathed to A. for life, and after his decease to B., B. takes an immediate vested interest. *Monkhouse* v. *Holme*, 1 B. C. C. 198; *Blamire* v. *Geldart*, 16 Ves. 314.

Occurrence of new words of gift.

And the occurrence of new words of gift in the ulterior disposition does not vary the construction. Thus, where a testator bequeaths

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personalty to trustees in trust for A. for life, adding, "and after her decease *then* I give," &c., this seeming postponement of the gift until the decease of A. does not prevent the immediate vesting. *Benyon* v. *Maddison*, 2 B. C. C. 75.

Words seemingly contingent referred to the determination of a prior interest.

So, it is well established that where a legacy is given to a legatee, *if*, or *provided*, or *in case*, or *when* (for it seems not to be very material which of these words is used, see 6 Ves. 243,) he attains the age of twenty-one years, *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389, or marries; *Elton* v. *Elton*, 3 Atk. 504; such a legacy, standing alone and unexplained, is contingent, and will be wholly defeated by the legatee's death before the age or event in question. Yet, if the interest accruing in the interval between the death of the testator and the future period in question, is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's case*, that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, modified and parcelled out into two distinct portions or interests, not for the purpose of protracting the vesting, but *diverso intuitu*. On this principle, in the case of *Hanson* v. *Graham*, 6 Ves. 239, (which is a leading authority), where a testator gave to his grandchildren, A., B., and C. 500*l.* Four *per cent.* Annuities a-piece, when they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen, with such consent as therein mentioned; and directed that the interest of the said legacies should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir *W. Grant*, M. R., held the legacies to be vested at the death of the testator, his Honor expressly intimating, that, if the construction had depended upon the first words, detached from the subsequent clause giving the interest, his conclusion would have been different. See also *Branstrom* v. *Wilkinson*, 7 Ves. 421.

So, in the case of *Lane* v. *Goudge*, 9 Ves. 225, where a testator bequeathed the residue of certain stock to A., for A.'s second daughter that he should have born, for her education, till she should attain the age of twenty-one years; and after she should attain to the age of twenty-one years, the testator gave the said interest to her and her heirs for ever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at seventeen. See also *Love* v. *L'Estrange*, 5 B. P. C. Toml. ed. 59; but see *Batsford* v. *Kebbel*, 3 Ves. 363, a case which has always appeared to the Editor a very questionable authority.

Gift of interest favors vesting.

A gift of interest, *eo nomine*, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; but this consideration applies with little, if any, force to a provision for main-

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tenance *out of* the interest. *Pulsford* v. *Hunter*, 3 B. C. C. 416. See also *Leake* v. *Robinson*, 2 Mer. 387. If, however, the *entire* interest is applicable to maintenance, the argument in favor of the vesting exists in its full weight. *Fonnereau* v. *Fonnereau*, 3 Atk. 645; *Heath* v. *Heath*, 2 B. C. C. 4.

Effect where principal and interest are blended.

Where the principal and interest are so undistinguishably blended in the bequest that both must vest or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., "as soon as they attain the age of twenty-one years, the sum of 200*l.*, with interest at the rate of 5*l. per cent. per annum*," Sir *J. Leach*, V. C., held that there was no gift either of principal or interest until the daughter attained twenty-one. *Knight* v. *Knight*, 2 Sim. & Stu. 490. But a direction subjoined to a simple bequest of stock, that the "interest" shall be added to the "principal," till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities might fall in. *Stretch* v. *Watkins*, 1 Madd. 253.

Vested interest under future direction to pay.

The rule, that, where the only gift is in a future direction to pay, the time of payment is annexed to the substance of the gift, is to be taken in subordination to the doctrine which negatives the postponement of the vesting, when the futurity of the gift is referable to the circumstances of the estate. Thus, if a sum of money is bequeathed to A. for life, and after his decease to trustees, upon trust to pay thereout certain legacies; though there is literally no direction to pay these sums until the death of the legatee for life, yet, as the payment is evidently deferred for the purpose of letting in the prior life interest, the pecuniary legatees take vested interests immediately on the death of the testator, which devolve to their representatives in the event of their dying during the life of A. *Monkhouse* v. *Holme*, 1 B. C. C. 298.

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4. *Vesting of Residuary Bequests.*

It has been generally thought that a very clear intention must be indicated in order to postpone the vesting of a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or rather *may be* its consequence; for, in solving questions of construction, we must look indifferently at actual and *possible* events. Thus, where a testator gave to trustees all his real and personal estate upon trust for sale; and, as to one moiety of the produce, for the benefit of his daughter A., during her life; and after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A. for and until they should severally attain his, her, and their ages or age of twenty-one years;

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and as to all the said principal monies or produce of the testator's said real and personal estate, *as and when they, and each and every of them, should attain his, her, and their respective age and ages of twenty-one years,* in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under twenty-one; and Lord *Gifford,* M. R., held, that they respectively acquired vested interests, his Lordship adverting to the circumstances that it was a gift of a residue, and that the yearly income was given to the children until the age in question. *Jones* v. *Mackilwain,* 1 Russ. 220. The last case was decided principally on the authority of *Booth* v. *Booth,* 4 Ves. 399, which has been justly considered as a strong decision in favor of the vesting of residuary bequests, as will appear by the following brief statement of it:—A testator bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces A. and B., until their respective marriages; and from and immediately after their respective marriages to transfer their respective moieties; and Sir *R. P. Arden,* M. R., held that A. acquired a vested interest, although she died without ever having been married; his Honor relying much on the circumstance that it was a bequest of residue (*a*).

Residue to be transferred at marriage held a vested interest.

After clear immediate gift, vesting not postponed by equivocal words.

It seems that where the testator has first given the residue in terms which would beyond all question confer a vested interest, the addition of subsequent equivocal expressions of a contrary tendency will not suspend the vesting. Thus, where A. by his will gave unto the children of his sister the whole of his real and personal estate, (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share; *and such portion not to be otherwise claimed and inherited, directly or indirectly, until the children arrived at the age of twenty-two years,* whether married or single; Sir *R. P. Arden,* M. R., held that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatee should not have the command of the principal till the age of twenty-two. See also *Stretch* v. *Watkins,* 1 Madd. 253. So, where a testator, after disposing of his real and personal estate in strict settlement, added a direction that none of the devisees should take or come into possession before the age of twenty-five, this was held to be confined to the actual possession, and not to postpone the vesting. *Montgomerie* v *Woodley,* 5 Ves. 522.

But subsequent

But where the terms of the original gift, embracing a class, are am-

(*a*) By comparing this case with *Atkins* v. *Hiccocks,* 1 Atk. 500, *ante,* p. 173, the reader will perceive how much stronger is the inclination to favor the vesting of residuary gifts than that of pecuniary legacies.

biguous in regard to the vesting, a clear intention to suspend the vesting manifested in the gift to a single object, will be decisive of the construction; since it is highly improbable that the testator should have had a different intention concerning a plurality of objects and an individual object. Thus, where a testator gave the residue of his estate, real and personal, to trustees: as to one-third, in trust for his daughter S. for life, and, after her decease, for the child or children of his said daughter, if more than one, share and share alike; to be paid, assigned, and transferred to them by his trustees, upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part should become the property of such only child, upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors, or administrators. And in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over.—Sir *L. Shadwell*, V. C., held, that the gift, in case the daughter should leave one child only her surviving was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift in case she should have more than one. *Judd* v. *Judd*, 3 Sim. 525.

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words may be explanatory.

The vesting is necessarily postponed where the attainment to a particular age is interwoven into, and made an essential ingredient in the qualification of the objects of the gift, as where it is to such children as shall attain, or to the children who shall attain (*a*), &c. Thus, where a testator devised his real estates to trustees, in trust for M. for life, and after her decease to convey the same unto and among all and every the child and children of M., *who should live to attain the age of twenty-three years*, and to his, her, and their heirs and assigns for ever, as tenants in common; and if there should be but one such child, then to such only child, his or her heirs and assigns for ever. And in case there should be no such child, or, being such, all should die under the age of twenty-three, then over—it was held that those children alone who attained the age of twenty-three were to take; and therefore the gift was void for remoteness. *Bull* v. *Pritchard*, 1 Russ. 213.

Attainment of particular age made a qualification of the devisees.

And, in several instances, gifts to children *on their attaining* a certain age have received a similar construction, even in spite of some circumstances apparently favourable to the immediate vesting. As, where a testatrix gave the residue of her estate and effects equally between her four sisters; and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally

Gift on attaining certain age held contingent.

(*a*) This seems to be the most correct mode of framing such gifts.

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attain the age of twenty-two years; *and upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal;* and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto. There was also a bequest, in favour of the other children, in case of death under twenty-two without issue; and a bequest over of the entirety in case all the children should die without issue, or, being such, they should die before the principal of their respective *shares* should become *payable*.—Sir *J. Leach*, M. R., held, that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. His Honor thought that the case was governed by *Leake* v. *Robinson*, and intimated an opinion, that even if the income had been expressly given to the children until they attain twenty-two, the shares would not have vested; for, the presumption, that the testator means an immediate gift, because the entire subject, including such interest, is separated from the bulk of the estate, failed entirely, when the testator had expressly given the legacy over, in the event of the death of the legatee before a particular period. *Vawdry* v. *Geddes*, 1 Russ. & M. 203.

Remarks on the case of *Vawdry* v. *Geddes*.

But did not the gift over, to which his Honor here alludes, suggest a strong argument for the immediate vesting? Where a testator directs, that, on a given event, the "shares" of the legatees shall go in a certain manner, an inference seems to be afforded, that, in the alternative event, the property is to belong to the legatees. The adjudged construction rendered the terms of the clause of *substitution* (for such it clearly was,) inaccurate throughout. And a similar observation applies to the earlier cases of *Mackell* v. *Winter*, 3 Ves. 236; and *Barker* v. *Lea*, Turner & Russ. 413; in both which residuary bequests to children on their attaining a particular age were held to be contingent in the interim, though in each case there was a bequest over, in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer to the payment rather than to the gift. In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible, and one cannot help suspecting that the judgment of the Court was somewhat biassed by the events which had happened, and which rendered the adopted construction convenient. Had intestacy been produced (as it might have been,) by the postponement of the vesting, there is little doubt that the adjudication would have been different.

It is to be observed, that, whenever vesting is postponed to a certain age, the attainment of that age is made, in *fact*, (though possibly not in *expression*), part of the qualification of the objects of the gift; and death, before its arrival, has the effect of striking the name of the deceased person out of the list of presumed objects. Hence, the *con-*

tingent interest of those persons can never be transmitted to representatives. Where, however, the contingency on which the vesting depends is a *collateral event*, the death of such legatee, pending the contingency, has no other effect than that of substituting the legatee's representative for himself. Thus, where a testator bequeaths his personal estate to A., and if he shall die without leaving issue at the time of his decease, then to B.; in the event of B. dying in the lifetime of A., testate or intestate, his contingent or executory interest will belong to his executor or administrator. *Pinbury* v. *Elkin*, 2 Vern. 758; *King* v. *Withers*, Cas. Temp. Talb. 117, S. C. 3 B. P. C. Toml. ed. 135; *Wilson* v. *Bayly*, 3 B. P. C. Toml. ed. 195; *Barnes* v. *Allen*, 1 B. C. C. 181.

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As to contingent transmissible interests.

XIV. GIFTS TO CHILDREN, ISSUE OR DESCENDANTS, BROTHERS AND SISTERS, NEPHEWS, NIECES, AND COUSINS.

GIFTS TO CHILDREN, &c.

1. *Description of Persons included.*
2. *Mode of Distribution among Issue of various Degrees.*
3. *Class entitled in Reference to the Period of Birth.*
   1st. *Where the Gift is immediate;* 2nd. *Where it is preceded by a Life-Interest;* 3rd. *Where Distribution is postponed to a certain age;* 4th. *Words operating to restrict or enlarge the Class;* 5th. *Claims of Child* en ventre sa mere; 6th. *Rule applicable to Grandchildren, Brothers, &c.*
4. *Gifts to Younger Children—First Son, Eldest Son, &c.*

Children of several marriages.

A gift to children generally (*a*) includes children by any marriage, past, present, or future; (see *Salkeld* v. *Vernon*, 1 Eden, 64; *Malim* v. *Keighley*, 2 Ves. jun. 333); and will not be confined to children of an existing marriage, merely on conjectural grounds, such as that of the testator being a relation of the husband or wife of the parent in question, still less from his describing the mother as the wife of A. B. And even, where a testator bequeathed to the children of his niece, the wife of A., declaring that the dividends should be applied for maintenance, *without any regard to the ability of their father*, Lord *Eldon* considered this expression to be insufficient to exclude the children of a second marriage; at the same time intimating his private opinion to be, that the testator never contemplated the event of his niece marrying again. *Barrington* v. *Tristram*, 6 Ves. 345.

So, in a late case, Sir *J. Leach*, M. R., held, that a bequest to the children of the testator's daughter was not restrained to her children by her then husband, by the testator having required *his* consent as well as *her's* to the marriage of the children, there being a general gift over in

(*a*) But as to younger children, *vide post.*

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case of the daughter dying *without leaving issue behind her*, which was considered to negative the restricted construction. *Critchett* v. *Taynton*, 1 Russ. & M. 541. The effect, of course, would be to read the requisition of the then husband's consent as not being co-extensive with the whole class embraced by the gift, but as applying only to that portion of it of which he was the parent.

Gifts to children not extended to grandchildren.

A gift to issue of one degree is, generally speaking, incapable of being extended to issue of another degree. Thus, a gift to children will not apply to grandchildren, though it was formerly considered, that, if there was no child, grandchildren might take; (2 Vern. 106, 1 Ves. sen. 201); and, even so recently as the case of *Earl of Orford* v. *Churchill*, 3 Ves. & Bea. 69, Sir *William Grant* observed, that, "where there is a total want of children, grandchildren have been let in under a liberal construction of the word 'children.'" The case, however, did not require such a construction; and, upon reflection, it is probable that this excellent Judge would have perceived its incompatibility with that primary rule,—enforced by none more ably and energetically than himself,—which forbids the expounding a testator's intention by the light of subsequent events, and which principle requires that the word "children," like every other descriptive appellation, should not be diverted from its proper and established signification, unless circumstances, existing at the making of the will, shew that it could not possibly have been used in that sense. As, where a testator gives to the children of A., who was dead when the will was made, leaving grandchildren but no child; probably in this case, and presuming the facts to be known to the testator, the bequest might be held to comprise the grandchildren. See *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419.

But it has been expressly decided, that, under a bequest to the children of five persons, described as the testator's *late* brothers and sisters, the grandchildren of one of the five, *who was* then *dead, leaving grandchildren, but no child*, could not take concurrently with the children of the other four; since, to have included them, would have involved the incongruity of reading the word "children" in two different senses. *Radcliffe* v. *Bulkeley*, 10 Ves. 195. The reasoning which excludes grandchildren from taking under a bequest to children, of course, would apply to the claim of great-grandchildren to be objects of a gift to grandchildren; and Lord *Northington's dictum* in *Hussey* v. *Berkeley*, 2 Eden, 196, in favour of such claim, is not to be relied on.

Gift to nieces not extended to great nieces.

It has been decided, that a great niece cannot take under a gift to nephews and nieces, though subsequently, in a codicil, described by the testator as his niece; and the circumstance that no niece was living at the testator's death was held not to vary the construction, for the conclusive reason assigned by the Master of the Rolls (Sir *T. Plumer*), that nieces *might* have been born. *Shelley* v. *Bryer*, Jac. 207.

It has been held, that a legacy to first and second cousins, includes first cousins once removed; the intention being, it is considered, to give to relations not more remote than second cousins. *Mayott* v. *Mayott*, 2 B. C. C. 125. And this was recently extended to first cousins twice removed; *Silcox* v. *Bell*, 1 Sim. & Stu. 301; and the fact that the testator has additionally mentioned a class of relations whom this liberal construction of the term "first cousins" includes, does not restrict it. *Charge* v. *Goodyer*, 3 Russ. 140.

GIFTS TO CHILDREN, &c.
Gift to cousins, how construed.

It has never been decided whether a gift to brothers and sisters extends to brothers and sisters of the half blood, (see 2 Mer. 363); but the affirmative is not to be doubted. It is well known that relations of the half blood are within the Statute of Distributions; and, consequently, are included in a gift to relations. *Cotton* v. *Scarancke*, 1 Madd. 45.

Half brothers and sisters.

A gift to descendants, or issue, (which seem to be co-extensive terms), will comprise descendants of every degree, (*Cook* v. *Cook*, 2 Vern. 545; *Crosley* v. *Clare*, 3 Swanst. 320, n.; *Wyth* v. *Blackman*, 1 Ves. sen. 196; *Pierson* v. *Garnet*, 2 B. C. C. 38, 230; *Butler* v. *Stratton*, 3 B. C. C. 369; *Bernard* v. *Mountague*, 1 Mer. 422), unless narrowed by the context. The word "issue" has been held to be restrained to children by a clause referring to their taking their *parents'* shares. *Sibley* v. *Perry*, 7 Ves. 522. Difficulty, however, often arises from the testator having used the words issue and children synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift from uncertainty, that the prevalency of one should be established. Lord *Hardwicke* thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution, viz. to each, or their respective *children*, one-fourth, the word children was not restrictive and explanatory of "issue" previously mentioned. *Wyth* v. *Blackman*, 1 Ves. sen. 196: see also *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welsh*, 2 Sim. 319.

Descendants or issue.

2. *Mode of Distribution among Issue of various Degrees.*

Wherever the devise or bequest embraces issue of several degrees, it should be distinctly shewn whether the objects are to take *per capita* or *per stirpes*. The different effects of these respective modes of distribution may be exhibited by the following supposed case—Gift to the issue or descendants of A. A. dies, leaving an only surviving child, who has no child, but has three grandchildren, the children of a deceased child; a distribution *per stirpes* would occasion a division of the property into moieties, of which one would go to the surviving child, and the other to the three grandchildren. A distribution *per capita* would cause a division into four shares, of which the surviving child would take one, and the three grandchildren respectively the remaining three. Where the gift is to issue, or descendants *simpliciter*, it seems, that the latter construction prevails, and that all the objects take as joint tenants; *Crosley* v.

Distribution *per stirpes* and *per capita*.

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Clare, 3 Swanst. 320, n.; *Davenport* v. *Hanbury*, 3 Ves. 257; unless the bequest contains words of severance, or other expressions, importing division or equality, which would make the legatees tenants in common, but would not further alter the construction. *Butler* v. *Stratton*, 3 B. C. C. 367.

On the same principle, it is clear, that if a testator, having living children, and also grandchildren, the children of a deceased son, makes a gift in favour of his children A. and B., and the children of his late son C., the distribution will be *per capita* and not *per stirpes;* for, though there may be plausible ground to conjecture that the testator intended the children of the deceased son to represent their deceased parent only, yet this, in the words of Lord Chancellor *King*, would be, "to go too much out of the will." *Blackler* v. *Webb*, 2 P.W. 383 (*a*).

Where the distribution among descendants or issue is *per capita*, children take concurrently with their parents. Thus, under a gift to the issue or descendants of A., a person who has died leaving three children, B., C., and D., of whom B. has no child, C. has one child but no grandchild, and D. has no child but three grandchildren, the distribution would be into seven shares, of which B. would take one, C. and her child respectively two more, and D. and her three grandchildren the remaining four. *Freeman* v. *Parsley*, 3 Ves. 421. And a bequest to such of the children of A., B., and C., as should be living at the testatrix's decease, or (which was turned into *and*) the issue of such of them as should be married, in equal shares, has also been held to cause a distribution *per capita*. *Horridge* v. *Ferguson*, Jacob, 583.

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3. *Class entitled in Reference to the Period of Birth.*

1st. *Where the Gift is immediate.*
2nd. *Where it is preceded by a Life Interest.*
3rd. *Where Distribution is postponed to a certain Age.*
4th. *Words operating to restrict or enlarge the Class.*
5th. *Claims of Child en ventre sa mere.*
6th. *Rule applicable to Grandchildren, Brothers, &c.*

Where gift is immediate.

1st. An immediate devise or bequest to children (*i. e.* a gift to take effect *in possession* at the testator's decease), whether of a person living, *Northey* v. *Burbage*, Pre. Ch. 470; *Hill* v. *Chapman*, 3 B. C. C. 391; or dead, *Viner* v. *Francis*, 2 Cox, 190, S. C. 2 B. C. C. 658; (but see *Martin* v. *Wilson*, 3 B. C. C. 324); whether the term be children simply, or *all* the children, *Heath* v. *Heath*, 2 Atk. 121; *Singleton* v. *Singleton*, 1 B. C. C. 542, n.; *Scott* v. *Harwood*, 5 Madd. 332; *Davidson* v. *Dallas*, 14 Ves. 576; comprehends the children living at the testator's decease, and those only. But if no child is then living, it extends to all who *at any time* afterwards come into existence. *Weld* v. *Bradbury*, 2 Vern. 705;

(*a*) As to gifts to the children of several, *vide post*, Sect. XVI.

Shepherd v. *Ingram*, Amb. 448; *Haughton* v. *Harrison*, 2 Atk. 329; *Harris* v. *Lloyd*, Turn. & Russ. 310. CLASS OF CHILDREN ENTITLED.

This adaptation of the construction to the event has not many parallel examples, and may be considered as exhibiting rather an exception to, than an illustration of, a general principle. It is clear, however, that the flexibility applies only to indefinite gifts, and not to those which expressly mark out and designate the class of children intended.

2nd. Where the devise or bequest is to a person for life, or for any other particular estate or interest, with an ulterior gift to children, the latter includes the objects living at the testator's death, and all who afterwards come *in esse* during the continuance of the estate for life, or other particular estate or interest. *Baldwin* v. *Karver*, Cowp. 309; *Devisme* v. *Mello*, 1 B. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Paul* v. *Compton*, 8 Ves. 375; *Meredith* v. *Meredith*, 10 East, 503; *Mogg* v. *Mogg*, 1 Mer. 654; *Leake* v. *Robinson*, 2 Mer. 363; *Crone* v. *Odell*, 3 Dow, 61 (*a*). Where preceded by a life interest.

This is a very convenient rule where the preceding interest is for the life of the parent, since it necessarily lets in every child who can come into existence. The entire property vests in the child or children, if any living at the testator's decease, with a liability to be divested *pro tanto* as the subsequent children are respectively born.

The rule which lets in children born down to the period of distribution, is often stated as if it required that they should be *living* at that period. See *Baldwin* v. *Karver*, Cowp. 309; *Ayton* v. *Ayton*, 1 Cox, 327; *Bartleman* v. *Murchison*, 2 Russ. & M. 140, marg. note; 1 Rop. Leg. 40, marg. note. It is sufficient, however, to establish the claim of any child, or of his representatives, that he was living at the death of the testator, or, subsequently, at *or before* the period of distribution or possession; and, to authorize a narrower construction, some restrictive terms must be elicited from the will. Children need not be living at the time of distribution.

It seems, that, where the postponement of distribution is occasioned by the reversionary nature of the property, there being a prior life-interest not belonging to the testator, children born before the reversion falls into possession are admitted precisely in the same manner as if the life-interest were created by the will. *Walker* v. *Shore*, 15 Ves. 122. But the mere charging with annuities the property bequeathed to the children, even by the same will, does not let in children born during the continuance of those annuities. *Singleton* v. *Gilbert*, 1 Cox, 68. Gifts of reversions.

(*a*) But see *Browne* v. *Groombridge*, 4 Madd. 495, where children born after the decease of the legatee for life, *i. e.* after the period of distribution, were held to be entitled. No reason is assigned for this novel construction, and it is impossible to suppose but that there is a mistake either in the report of the will, or of the judgment.

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Where the prior interest is not for the life of the parent of the children to whom the ulterior property is given, it is obvious that there may happen to be no child born until after the expiration of such interest; and then a question would arise as to the admission of such subsequently born child or children. On this point it is conceived that the following distinctions may be gathered from the cases. 1st. That, if the subject of devise be the legal inheritance of freehold lands, as the ulterior devise to the children must take effect, if at all, as a remainder, it follows, from the rules applicable to this species of estates, that, unless some child is *in esse* before the preceding particular estate determines, the remainder will fail, by reason of the impossibility of its taking effect at the instant of the determination of the particular estate. Thus, if freehold lands of a testator are devised to A. for life, and after his decease to the children of B. in fee, and A. dies before B. has any child born, the remainder to the children will fail; and the same consequence would ensue if A.'s estate ceases by forfeiture before B. has any child, unless the remainder has been preserved from destruction in this event. But that, 2ndly, if the gift to the children be not subject to the rules governing contingent remainders, as if it be an executory devise, or a devise of copyhold lands, or of freeholds, in which the testator had the equitable inheritance only, or if it be personal estate; in any of these cases, it should seem, that, in the event of no child being in existence when the gift takes effect in possession, or rather having been in existence at some time since the decease of the testator, the effect of this event would be to let in the whole range of children at any time thereafter born. Thus, if lands are devised to A. in fee, and if A. dies under age and without issue, then to the children of B. in fee, and, in default of such children, to C. in fee; if A. should die under age, without leaving issue when B. has not a child born, the executory devise to such children would not be defeated by that event, but would take effect in favour of any child or children afterwards coming into existence. *Hutcheson* v. *Jones*, 2 Madd. 124; *Horseman* v. *Abbey*, 1 Jac. & W. 381.

Effect where there is no object at the period of distribution.

Gift held to await the event of the birth of children.

It ought to be observed, that the cases from which the above conclusion has been drawn are far from numerous, and do not professedly authorize it, though they strongly tend to establish such a construction. It is tacitly recognised in the case of *Wyndham* v. *Wyndham*, 3 B. C. C. 58, where a testator bequeathed the residue of his estate to A. for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A. should die without any child or children, then he left the residue to the younger children of B. if he should have any, and if not, he left it to C. A. died without children before B. had any, and B. afterwards died without having had a child, and the question in this cause was, as to what became of the income in the interval between the deaths of A. and B.; which question of course asssumes, that the property did not go over to C. immediately on the death of A. without a

child, but remained in expectancy during the whole life of B. to await the event of his having chidren.

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The doctrine, however, of the cases in question may seem to be encountered by the late case of *Bartleman* v. *Murchison*, 2 Russ. & M. 136, or rather by the principle of the reasoning of the present Lord Chancellor; for the case itself was distinguishable in this respect, that the gift was to an individual and not to a class. The bequest was of an annuity to A. for life, and after her decease to B. "*if a widow*, but not otherwise, but to revert back to any child or children after her death;" and it was held that B., who was married at the death of A., and *afterwards* became a widow, was not entitled; Lord *Brougham* observing—"Although, in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are, to a great extent, applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, his Lordship remarked—"It is only following out the same principle, to hold, *that a person to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.*"

Class entitled, where, distribution is postponed to a certain age.

3rd. The remaining rule of construction respecting gifts to children is, that where the possession or distribution is postponed until the attainment of a particular age, the gift will include the children living at the death of the testator, and those who come into existence before the *eldest* reaches the prescribed age (*a*).

As, where a testator bequeaths a sum of money to be divided among such of the children of A. as shall attain the age of twenty-one years, the gift will embrace as well children living at the testator's decease, as those who come in *esse* before the majority of the eldest. *Congreve* v. *Congreve*, 1 B. C. C. 530; *Gilmore* v. *Severn*, Id. 582; *Barrington* v. *Tristram*, 6 Ves. 348; *Paul* v. *Compton*, 8 Ves. 380; *Gilbert* v. *Boorman*, 11 Ves. 23; *Curtis* v. *Curtis*, 6 Madd. 14; *Titcomb* v. *Butler*, 3 Sim. 417; *Balm* v. *Balm*, Id. 492. And the rule is the same where the bequest is to *all* the children. *Whitbread* v. *Lord St. John*, 10 Ves. 152. *Pari ratione*, if the distribution is to take place at the majority of the *youngest* child, then, children born up to that period will be let in. *Hughes* v. *Hughes*, 3 B. C. C. 352. In these respective cases, if the eldest or youngest child (as the case may be) in the testator's life-time reached the age which was made the period of distribution, the gift being in event immediate at his decease, would receive the same construction

(*a*) *Quære*—whether this rule applies to general and independent legacies to children, *vide Ringrose* v. *Bramham*, 2 Cox, 384, noticed *post*, 188.

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as if it had been so framed, *i. e.* would be confined to children existing at the death of the testator.

The rule which lets in children born down to the period when some one object is entitled to call for distribution, shews the anxiety of the Courts in construing gifts to children, to widen the range of objects as much as can be done, without postponing the enjoyment of *any* of the legatees beyond the prescribed age, which would be the necessary consequence of waiting, after the attainment of such age by any child, to see if any others come into existence. And a construction narrowing the class will not be adopted on light, though plausible grounds, such as that of the trustees having a power of advancing the shares before the period of distribution. *Titcomb* v. *Butler*, 3 Sim. 417.

Construction not varied by gift over.

But where an immediate gift to children is followed by a gift over to the survivors, in the event of any of them dying under twenty-one, though this would necessarily postpone the distribution of the original share of each legatee until his or her majority (which, indeed, the incapacity of minority would do), yet the gift is confined to children living at the testator's decease; *Davidson* v. *Dallas*, 14 Ves. 576; and, consistently with the principle of this determination, it has been held, that a direction to trustees, accompanying an immediate devise to children, to accumulate the rents for their benefit until they attain the age of twenty-one, does not entitle children born pending the trust. *Scott* v. *Harwood*, 5 Madd. 332.

Words narrowing or enlarging class.

4th. The preceding rules fixing the class of objects in reference to the period of their birth, only apply when the gift is indefinite; for the construction involved in them, of course yields to, and is liable to be controlled by, words pointing out a wider or narrower range of objects.

"Now living."

Thus, the words "now living," added to a gift to children, take it completely out of the rules in question; the time referred to is held to be the period of making the will; precluding the claim, therefore, of children born in the interval between that period and the death of the testator (*a*); *James* v. *Richardson*, 1 Vent. 334, 2 Vent. 311, S.C. nom. *Burchet* v. *Durdant*, T. Raym. 330; see *Attorney-General* v. *Bury*, 1 Eq. Ca. Ab. 201; *Crosley* v. *Clare*, 3 Swanst. 320, n.; *Abney* v. *Miller*, 2 Atk. 593; *Blundell* v. *Dunn*, cit. 1 Madd. 433; and not only so, but the objects are regarded not as a fluctuating class, embracing such of the children existing at the date of the will as happen to be living at the testator's decease (as one should have inferred, judging from the construction applied to indefinite gifts to children); but the gift is con-

(*a*) The same reasoning might apply to verbs in the present tense. But, as to a bequest to A.'s children to every child he *hath*, *vide Ringrose* v. *Bramham*, 2 Cox, 384, *post*, 188.

strued as applying to the children living at the making of the will, *as individuals*, in the same manner as if they were described by name; from whence ensues this consequence, that, if any of them die in the life-time of the testator, being tenants in common, their shares lapse. See *Ackerman* v. *Burrows*, 3 Ves. & Bea. 54; see also *ante*, p. 93. CLASS OF CHILDREN ENTITLED.

The word, *born*, or *begotten*, however, added to a gift to children, does not restrict it to objects born before the making of the will, (Co. Litt. 20. b.), or before the death of the testator; *Browne* v. *Groombridge*, 4 Madd. 495; nor does a gift to children *hereafter to be born* apply exclusively to after-born children, but includes such as are born before the making of the will. *Doe* v. *Hallett*, 1 Mau. & Selw. 124; see also *Hewet* v. *Ireland*, 1 P. W. 426. Words "born" or "begotten."

The effect of the words "*to be* born or begotten," in letting in after-born children, admits of the following distinction:—If the gift is *immediate*, so that, without these additional words, it would be confined to children living at the testator's death, they operate to enlarge the gift, so as to comprehend all after-born children, without any regard to the circumstance of there being, or not being, a child living at the death. But where the words in question are annexed to a gift *in remainder*, or any other future gift, which would, under the ordinary rule, embrace children born after the testator's decease, they do not in general enlarge or vary the range of objects. "*To be* born," or "*to be* begotten."

Thus, if a testator give a fund to the children of A., *hereafter to be born*, the bequest will not be confined to the children, if any living, at the testator's decease (as would have been the construction without these words), but will extend to *all* after-born children: *Mogg* v. *Mogg*, 1 Mer. 654: while, on the other hand, if the gift be to A. for life, and, after his decease, to his grandchildren *hereafter to be born;* this will extend to grand-children coming into existence before the period of distribution, but no farther, being precisely the same construction which would have obtained if the words in question had not been added. *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238. And a power of selection, by will, given to a legatee for life, in favour of grand-children "hereafter to be born," has been held not to authorize an appointment to grandchildren born after her death. *Paul* v. *Compton*, 8 Ves. 375.

But it should seem that there would be no such exclusion of children born after the period of distribution or payment, where the subject of gift is, not an entire fund to be distributed among the children, but a separate independent legacy to each; for, where a testator gave to all the children of A., whether now born, *or hereafter to be born*, the sum of 2,000*l.* each, payable at twenty-one, Sir *W. Grant*, M. R., held that the children, whenever born, were included, though the testator had directed the executors, *soon after his death*, to set apart a sufficient sum for pay- Legacy to children born and hereafter to be born at twenty-one.

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ing the legacies; his Honor conceiving such direction to be insufficient to control the preceding express terms of the gift, which this construction rendered impracticable. *Deffles* v. *Goldschmidt*, 1 Mer. 417.

Whether preceding rules apply to pecuniary legacies.

Perhaps this case may suggest a doubt how far the preceding rules, fixing the classes of children entitled under indefinite gifts, and which were applied generally, if not invariably, to bequests of an *entire fund*, or property, among children, are applicable to pecuniary legacies to them respectively, and payable, not out of any divided or appropriated fund, but out of the general personal estate. In the latter case, the letting in unborn children is not attended with the consequence of postponing the payment of the legacies of the elder children, (unless there was doubt of the adequacy of the estate to provide for all), but with the still more inconvenient effect, of tying up the entire personalty which cannot be distributed until the number of the pecuniary legatees is ascertained; and this inconvenience appeared so considerable to Lord *Alvanley*, in the case of *Ringrose* v. *Bramham*, 2 Cox, 384, that he made it one (though it was only one) of the grounds for refusing to admit children born in the interval between the death of the testator and the majority of the eldest, under a bequest—" to A.'s children, 50*l.* to every child he *hath* by his wife E., to be paid to them by my executors *as they shall come of age.*" Whether this case will be considered as an authority for confining to children living at the death of the testator pecuniary legacies to children payable at majority, or as referable to the particular penning of the will, seems doubtful.

Child *en ventre sa mere* regarded as a child in *esse*, and even born.

5thly. In applying the rules which regulate the claims of children by the period of their birth, a child *en ventre sa mere* is to be considered as a child in existence, and nothing but a clearly marked intention would induce a contrary construction. Thus, not only will a devise or bequest to the children of A. *living* at a given period include a child of this description; *Doe* v. *Clark*, 2 H. Bl. 379; but even a gift to children *born* at a prescribed period, has been recently held to extend to a child then in *esse*, though not actually born. *Trower* v. *Butts*, 1 Sim. & Stu. 181. See also 1 Bos. & Pull. 243. The express mention of posthumous children, therefore, has been properly omitted out of the modern forms.

Rules fixing the class of objects apply to grandchildren, brothers, &c.

6thly. Gifts to grandchildren, great-grandchildren, and remoter degrees of issue, are governed by the same rules of construction, in regard to the period of ascertaining the objects as gifts to children. (See 2 Vern. 545). And gifts to brothers and sisters, nephews and nieces, &c. are also undistinguishable, being, in fact, substantially gifts to children described by another degree of relationship; for instance, a gift to nephews and nieces is, in effect, a gift to the children of brothers and sisters. Thus, it is clear, that, if land or money is given to a person for life, and after his decease to his brothers or sisters, the gift will include the brothers or sis-

ters living at the testator's decease, and those who come in *esse* during the life of A. *Devisme* v. *Mello*, 1 B. C. C. 537; *Leake* v. *Robinson*, 2 Mer. 363; *Balm* v. *Balm*, 3 Sim. 492. So, if an immediate devise or bequest is made to brothers or sisters, it will apply to brothers and sisters living at the testator's death, without regard to the antecedent history of the class. *Doe* v. *Sheffield*, 13 East, 526. Nor is this construction opposed by the case of *Ackerman* v. *Burrows*, 3 Ves. & Bea. 54, where the will consisted of a letter written by the deceased to his mother and sisters, expressing his wish that his property should be divided amongst them, (the words were "I could wish it to be divided amongst you"); and the mother and one of the sisters having died in the testator's lifetime, Sir *W. Grant*, M. R., held that their respective shares lapsed; for it is evident that his Honor's conclusion was founded, not on any general rule of construction applicable to gifts to brothers and sisters as distinguished from children, but on the language of the will, which was considered to point at the individuals whom the writer addressed, and not to a fluctuating class, the effect being the same as if he had said, "I give to my sisters, A., B., &c."

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4. *Gifts to younger Children, first Son, eldest Son, &c.*

GIFTS TO YOUNGER CHILDREN.

Younger, means unprovided for children.

Gifts to *younger* children are commonly intended as a provision for the unprovided for branches of a family, as the *eldest* son, by the law of primogeniture, and the ordinary mode of family settlements, usually takes the estate; and this consideration has so materially influenced the construction, that the term "younger children" has been held, in many instances, to mean children without distinction of age, other than those who take the estate. Thus, if a testator, having power to devise lands to any of his children, charged with portions for the younger children, appoints the lands to one or more of the children, the other children, *though senior to the appointees* of the land, would be entitled to share in the portion. *Duke* v. *Doidge*, 2 Ves. sen. 203. See also *Chadwick* v. *Doleman*, 2 Vern. 525; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncombe*, Id. 451; *Hencage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnett*, 2 B. C. C. 38; *Hall* v. *Luckup*, 4 Simons, 5 (*a*). And, upon the same principle, a gift to younger children is confined to children of an existing marriage, since otherwise it might let in the eldest son of a future marriage taking, by settlement or otherwise, a large estate. *Coleman* v. *Seymour*, 1 Ves. sen. 209.

Where gift is by parent or person standing *in loco parentis*.

But the construction in question, it seems, is confined to gifts by parents, or a grandfather, (1 Ves. sen. 209), or other person standing *in loco parentis*, and does not extend to gifts by strangers, who are considered to use the term "younger children" in its general or popular sense. See

(*a*) It is clear, that a gift of portions to children in general cannot be restrained to younger children, because charged on an estate which is devised to the eldest son. *Incledon* v. *Northcote*, 3 Atk. 438.

GIFTS TO YOUNGER CHILDREN.

Lord Teynham v. *Webb*, 2 Ves. sen. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166. Nor is there any reported instance of its being applied to dispositions of real estate, unless where aided by the context. See *Hencage* v. *Hunloke*, 2 Atk. 456.

Whether, in all other respects, gifts to *younger* children are governed by the rules which apply to gifts to children in general, is doubtful. A gift to younger children, taking effect in possession at the decease of the testator, certainly has been held, in conformity to the general rule, to include the persons *then* answering to the description, and those only. *Coleman* v. *Seymour*, 1 Ves. sen. 209. And it might seem to follow, that a gift to A. for life, and after his decease to his younger children, would apply to those who answered the description at the testator's decease, and who afterwards came into being. See *Lady Lincoln* v. *Pelham*, 10 Ves. 166. But this construction, however well recommended by the principles of analogical reasoning, has not invariably been adopted; for, in many instances, gifts to younger children, preceded by the gift of a life interest to the parent, have been held not to apply to a younger child, who becomes an elder during the life of the legatee for life. *Hall* v. *Hewer*, Amb. 203; *Ellison* v. *Airey*, 1 Ves. sen. 111. Of course, an express exception of the son, who shall be the eldest at the time of the death of the tenant for life, restrains the gift to the younger children *at that period*. *Billingsley* v. *Wills*, 3 Atk. 219. And a gift to the elder son for the time being in one part of the will, would, it seems, form a ground for giving a similar construction to a gift to younger children indefinitely in another part. See *Bowles* v. *Bowles*, 10 Ves. 177; *Sansbury* v. *Read*, 12 Ves. 175.

At what period the description of younger children must apply.

It is clear, that, if there be an express gift over in the event of a younger child becoming an elder before a given age or period, such a child, becoming an elder *after* the prescribed age or period, is not excluded, agreeably to the rule *exclusio unius est inclusio alterius*. *Windham* v. *Graham*, 1 Russ. 331. Some of Lord *Gifford's* reasoning in this case favours the conclusion that the time of vesting is the period of ascertaining who are younger children; and which seems to be the sound rule, though scarcely reconcileable with the case of *Matthews* v. *Paul*, 3 Swanst. 328, where Sir *T. Plumer* held, that the exception of "an eldest son" applied to the time of distribution, and not to the period of vesting. The circumstances, however, were not such as to render it necessary to decide on the alternative of these two constructions.

Gift to *second* son.

Gifts to *first* and *second*, *eldest* and *youngest* children, frequently raise a question with respect not only to what is meant by these words, but also to the period when they are to be applied. In *Trafford* v. *Ashton*, 2 Vern. 660, under a devise in trust for A. for life, remainder to the *second* son of her body in tail, "second" was held to mean second in order of *birth*, and to apply to a second son who had become an elder at the testator's decease.

"First son."

In *Lomax* v. *Holmden*, 1 Ves. sen. 290, Lord *Hardwicke* considered, that,

under a devise to A. for life, remainder to his *first* son in tail, *first* was to be construed as *eldest*, so as to extend to a son who was the second in order of birth, but the eldest at the testator's decease. GIFTS TO YOUNGER CHILDREN.

In *Driver* v. *Frank*, 3 Mau. & Selw. 25, a testatrix devised to A. for life, remainder to the *second*, third, and every other son of A. by his then wife (except the first or eldest) successively in tail. Mr. Justice *Dampier* and Lord C. J. *Gibbs* thought that the estate vested in the second born son, whether the elder were living or not; and Mr. Justice *Bayley* thought that it vested in the second existing son as soon as A. had two sons together in *esse;* which did not happen until after the death of the testator: but the point did not arise, as the question was, whether, the three elder sons having died without issue, the fourth son, who at the decease of A. had become the only surviving son (and who had co-existed with an elder son), could take. The majority of the Judges decided in the affirmative. "Second son."

A gift to the "youngest child" has been held to extend to an only child. *Emery* v. *England*, 3 Ves. 232; see *West* v. *Lord Primate of Ireland*, 2 Cox, 258. See some points, noticed at the end of Sect. XVI., as to gifts to the children of several persons. "Youngest child."

XV. GIFTS TO ILLEGITIMATE CHILDREN.

GIFTS TO ILLEGITIMATE CHILDREN.

Children born out of wedlock may take under any description which they have acquired by reputation, and which adequately designates them, collectively or individually, as objects of gift. *Metham* v. *Duke of Devon*, 1 P. W. 529. The word "children," however, or any other term descriptive of issue, of whatever class, imports legitimate issue, and those only; and, in order to extend it to persons of illegitimate birth, it must be shewn that, by necessary or irresistible implication, such was the intention of the testator. And the circumstance that no legitimate issue have in event existed to advance their superior claim, is immaterial, since it would be conclusive against the illegitimate children that their claim *might* have come into competition with, and have been excluded by, those of legitimate issue. Hence it follows, that illegitimate children can never be let in under a gift to the children simply of a living person; for, since such a gift, by the established construction (*vide ante*, p. 182), would include children born in the interval between the making of the will and the death of the testator, the fact of the non-existence of any other than illegitimate children at the former period raises no necessary inference that the testator did not contemplate such a change of circumstances as would supply the gift with legitimate objects. Thus, if a testator, being a bachelor, and having illegitimate children, whom he has always recognised and treated as his own, makes a gift in favour of his children generally, however plausible may be the conjecture that he in- Children, *primâ facie*, means legitimate children.

GIFTS TO ILLEGITIMATE CHILDREN.

tended the illegitimate children, yet it is only conjecture; and, consequently, the general rule prevails. *Godfrey* v. *Davis*, 6 Ves. 43; *Harris* v. *Lloyd*, 1 Turn. & Russ. 310.

So, where a testator gives to his children by an unmarried woman with whom he is then living, or has previously lived, still it would be presumed that he contemplated marrying her. *Kenebel* v. *Scrafton*, 2 East, 530; *Arnold* v. *Preston*, 18 Ves. 288. And if the testator were married at the time, the rule would be the same, as he might contemplate surviving his wife and then marrying the woman in question. But if the contents of the will indicate that the testator expected his wife to survive him, (and a legacy to her of course would be such an indication), this is considered to negative his supposed contemplation of marriage with the mother of the children, and lets in illegitimate children. *Wilkinson* v. *Adam*, 1 Ves. & Bea. 425. The dissolution of the marriage, by a divorce, even in such a case, offers a scheme reconciling the testator's expectation of his wife's survivorship of himself with the possibility of his marrying the woman in question. But, in *Wilkinson* v. *Adam*, this was either overlooked, or (which is more probable, remembering by whom it was decided (*a*),) was considered as too much out of the ordinary course of transactions to be presumed to have entered into the testator's calculation.

Necessary implication in favor of illegitimate children.

But if, according to events existing *at the time of the making of the will*, the testator must necessarily have meant illegitimate children, (as, where the gift is to the children of a person who has previously died, leaving no other than illegitimate children, which fact appears to have been known to the testator), such children may take under the bequest. *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419. And the same principle would apply equally to a gift to the children even of a living person, the terms of which exclude after-born children, as to children "now living." *Blundell* v. *Dunn*, cit. 1 Mad. 433.

Gifts to pre-existing children.

It must not be supposed, however, that a different rule obtains in regard to gifts to pre-existing children, from that which applies to children in general; for it has been repeatedly decided, that, under a gift to the children of a deceased person, the existence of legitimate children is fatal to the claim of illegitimate children. *Fraser* v. *Pigott*, 1 Younge's Eq. Exch. Rep. 354; see also *Swaine* v. *Kinnerley*, 1 Ves. & Bea. 469; *Hart* v. *Durand*, 3 Anst. 684. Indeed, the two last of the cited cases carried the rule so far as to make the existence of a *single* legitimate child a ground for excluding illegitimate children, *though the gift was to children in the plural;* but to this extent they have not been followed. Thus, in the case of *Gill* v. *Shelley*, at the Rolls, 28th January,

(*a*) The Editor has been informed that the point was adverted to, though it is not noticed in the Report.

GIFTS TO ILLEGITIMATE CHILDREN.

1831 (*a*), where the testatrix gave her real and personal estate to her husband, J. M., for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her will, adding, "amongst whom I include the children of the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir *J. Leach*, M. R., said, that if *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed that the illegitimate child was entitled to share in the residue.

The only obvious distinction between these cases and *Gill* v. *Shelley* is, that in them the bequest was to *child* and children; but which, it is conceived, makes no real difference; since the testator evidently uses the singular number, not with a view to the *then* existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. It is apprehended, therefore, that the cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand*, (which always appeared to the Editor to carry the exclusion of illegitimate children a step too far) may be considered as overruled.

Of course, a gift to the children even of a living person, described as consisting of a definitive number, will include illegitimate children if they are required to complete the numerical description. 1 Ves. & Bea. 467. Such a gift, indeed, seems to be undistinguishable in principle from a gift to illegitimate children *by names* which they have acquired by reputation, which is notoriously good; *Rivers's case*, 1 Atk. 410; see also *Mortimer* v. *West*, 3 Russ. 370; and the designation of them as *legitimate* children will not affect their claim, being merely an inaccurate superfluous addition to the preceding terms of description. *Standen* v. *Standen*, 2 Ves. jun. 589.

Illegitimate children may take by name.

The following cases well exemplify the rejection of conjectural grounds for including illegitimate progeny in gifts to children:

A testator, having three legitimate and one illegitimate child, gave his property to all and every the child and children whom he might happen to leave at his death, and shewed, by expressions in the direction concerning maintenance, that he contemplated a division of the property into fourths; Lord *Rosslyn* held that the illegitimate child was not entitled to share with the legitimate children; *Cartwright* v. *Vawdry*, 5 Ves. 530; and Lord *Eldon* has expressed his cordial acquiescence in the decision. See 1 Ves. & Bea. 464.

Mere conjecture does not entitle illegitimate children.

(*a*) For a report of this case the profession is indebted to Mr. Wigram, who has added it to his printed statement of, and observations on, *Goblet* v. *Beechy*, noticed *ante*, p. 156.

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So, where a testator made bequests in favour of his four illegitimate children, (describing them by name, and as having been baptized as the children of himself and A. B.), *together with every other child of the body of the said A. B. living at his decease, or born and living within nine calendar months afterwards;* it was held that illegitimate children, born after the making of the will, were not entitled, there being nothing "to shew by necessary implication that the testator intended that illegitimate children should take." *Mortimer* v. *West*, 3 Russ. 370. Applying to this case the test before suggested, we shall find, that, if the testator, or any one else, had married A. B., the children of such marriage would have taken under the bequest in question, and consequently it was properly held that illegitimate children could not.

Again, where a testator gave the residue of his property equally between the children of his son W. and of two other children, it was held that an illegitimate child of W. was not entitled to share in the residue, though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son W. *Bagley* v. *Mollard*, 1 Russ. & Myl. 581. And, *à fortiori*, will such a child not be let in by the testator's recognition of him or her in documents *dehors* the will. *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422; see also *Arnold* v. *Preston*, 18 Ves. 288.

Deviations from the strict rule of exclusion.

In some instances, however, feelings of compassion towards the innocent victims of the law's stern but salutary policy, have induced a tacit relaxation of the strict rule of construction exemplified in the class of cases just stated. As where a testator, resident in India, bequeathed in the words following: "To my children the sum of pounds sterling 5000. To the mother of my children the sum of sicca rupees 6000." *Beachcroft* v. *Beachcroft*, 1 Madd. 430. Indeed, in one instance, an able Judge is made to treat it as a general rule of construction, that illegitimate children may take under a gift to children; see *Bayley* v. *Snelham*, 1 Sim. & Stu. 78; and (what is even yet more strange) to cite as an authority for this position the case of *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422, which stands upon grounds extremely special, as every one conversant with Lord *Eldon's* elaborate judgment in that case well knows. But the decree in *Bayley* v. *Snelham* did not require to be supported by such doctrine, the language of the will powerfully aiding the claims of the illegitimate children; and hence there would be ground to suspect (were the reporters ordinarily less faithful), that the Vice-Chancellor's observations were misunderstood.

Rule as to reference to the male parents.

It is no objection to a gift to existing illegitimate children, that they are described as the children of both their reputed mother and father, since the reputation would be conclusive in regard as well to the male as to the female parent; but a gift to the *future* illegitimate children of a man is admitted on all hands to be bad. It is even doubtful whether

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Child *en ventre sa mere.*

a gift to a child with which an unmarried woman is pregnant, described as the child of a particular man, is valid. *Earle* v. *Wilson*, 17 Ves. 528; but see *Evans* v. *Massey*, 8 Price, 22. Its validity depends on the question being, whether a testator can fairly be considered as meaning to incur the risk of the child not having been procreated by the person whom he describes as the father, (whether himself or another), or intends to make the fact an essential ingredient in the qualification. The latter hypothesis would be fatal to the gift. However, if the infant *en ventre sa mere* is described as the child of the woman only, without reference to the father, the gift is, in every point of view, unimpeachable, (*Gordon* v. *Gordon*, 1 Mer. 141; *Dawson* v. *Dawson*, 6 Madd. 292), because it is sufficiently certain, and has no immoral tendency: not so, where the gift would embrace the unprocreated illegitimate children of a woman; which, though free from objection on the ground of uncertainty, might seem to be obnoxious to the principle of the reasoning which has been applied to, and has been held to vacate, bonds given to a kept mistress, in consideration of future cohabitation. (As to which *vide ante*, Vol. 3, p. 328). It would be idle to deny that a prospective provision for illegitimate offspring tends to promote the illicit connection from which they arise; and, perhaps, when the ground of the acknowledged invalidity of a gift to the future illegitimate children of a *man* is examined, it will be found to possess little force beyond what is derivable from this consideration; for, if the objects of a gift to the existing illegitimate children of a man are ascertainable by reputation, why may it not be equally resorted to in fixing the objects of a gift to his future offspring? It is true, that reputation cannot take place until after birth; but it seems to be wholly unimportant, so far as concerns the ultimate ascertainment of the objects of the gift, whether the name and filial character are thus acquired before or after the making of the will. It is true, also, that subsequently born children cannot have been known to the testator; but his recognition of them is not essential to the claims of illegitimate children, except as it may happen to constitute part of their evidence of reputation, which it necessarily does where the gift is to the testator's own offspring. It should seem, then, that something more is meant by the old writers, who have denounced the gifts in question as illegal, (*vide ante*, p. 15), than to raise the objection of uncertainty; they must be considered as taking the higher ground which has been suggested; and hence would flow this important practical result,—that gifts to the future illegitimate progeny of a woman, no less than of a man, are invalid. If, on the other hand, the whole gist of the objection to the future gifts in question lies in their uncertainty, it cannot apply indiscriminately to *all* gifts to the unborn illegitimate children of a man, but must be confined to such as make the fact of the filial relation to the *male* parent (which cannot, properly, be the subject of inquiry,) a part of the qualification; for, if

Whether gift to future illegitimate children is valid.

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it is clearly evinced that *reputation* alone is to entitle them, it seems impossible to view such gifts as standing in a less favourable plight than gifts to the future illegitimate children of a woman.

It should be observed, however, that a gift to the future illegitimate children, restricted to such as are born in the testator's life-time, might possibly be maintained, consistently with the invalidating principle contended for in the preceding observations; because, as the gift does not extend to objects born after the will takes effect, at no point of time can it be said to offer encouragement to incontinency. Hence, a gift so expressed affords the best chance of sustaining a prospective provision for objects of this nature, though, in the absence of decision, it would be unwise in practice to rely on its efficiency.

Suggestion as to providing for illegitimate children.

The only certainly effectual mode of providing for illegitimate children, who are not *in esse* when the will is made, is, by the execution of a codicil after the birth of each, which should clearly express the disposing intention in favour of the child, leaving nothing to implication; for it has been decided that the fact of a testator, by a codicil, recognising as his own an illegitimate child, born since the execution of the will, does not entitle him or her to come in under a bequest in the will to children generally. *Arnold* v. *Preston*, 18 Ves. 288.

Another point worthy of attention is, that, in giving real or personal property to illegitimate children, a vested interest should never be left in them, in the event of their dying without issue, until they have reached an age which enables them to dispose of it; since (as bastards can have no heirs or next of kin other than those which issue from themselves) the effect would be to let in the title of the crown. This title extends to the entire and real personal estate, with a few exceptions. The dower and distributive share of any widow the deceased may have left are, of course, to be excepted; also copyholds, which belong to the lord of the manor, *Walker* v. *Denne*, 2 Ves. jun. 170; whose claim, however, arising *propter defectum tenentis*, of course does not extend to equitable interests; on which principle, where A. by his will devised copyholds to B. and his heirs, upon condition that within one month he paid to the executors 2000*l.*, which the testator directed should be taken as part of his personal estate, and A. then disposed of this sum of 2000*l.* to charities, and afterwards died without heir or next of kin—Sir *J. Leach*, V. C., held, that the void legacy of 2000*l.* belonged to the crown. *Henchman* v. *Attorney-General*, 2 Sim. & Stu. 498 (*a*). In the great case of *Burgess* v. *Wheate*, 1 Eden, 177, it

(*a*) The exclusion of the title of the devisee of the land, in this case, is important, as bearing on a point discussed in a previous section, (*ante*, p. 96), and treated as presenting much difficulty, from the apparent equiponderance of the several conflicting authorities; of which, it is remarkable, that *Arnold* v. *Chapman*, 1 Ves. sen. 108, alone, was cited to or

was held that where lands were limited to A. and B. in fee, in trust for C. in fee, and C. died without heirs, the crown was not entitled to call for a conveyance from A. and B.; who, therefore, it should seem, (though this it was not necessary to determine), would be enabled to retain the property discharged from the trust. The doctrine of this case, which was decided by Lord Keeper *Henley* and Sir *T. Clarke*, M. R., in opposition to the opinion of Lord *Mansfield*, has attracted much attention, and has had many learned champions and opponents. *Vide* 2 Ves. sen. 300; 1 B. C. C. 200; 3 Ves. 424; 3 Ves. 752; *vide* further as to the failure of heirs, *ante*, Vol. 4, p. 187.

GIFTS TO ILLEGITIMATE CHILDREN.

XIV. GIFTS TO NEXT OF KIN—RELATIONS—LEGAL REPRESENTATIVES—PERSONAL REPRESENTATIVE—EXECUTORS OR ADMINISTRATORS—FAMILY OR HOUSE—HEIR.

GIFTS TO NEXT OF KIN.

"NEXT OF KIN."

"Next of kin," how construed.

Gifts to next of kin have raised the rather nice question, whether they are confined to the persons taken strictly as next of kin under the statutes of distribution (*vide post*), or extend to those whom the statutes admit to share in the personal estate as the representatives of next of kin. The former construction is supported by the respectable names of Mr. Justice *Buller* (*Phillips* v. *Garth*, 3 B. C. C. 64), Sir *Lloyd*, afterwards Lord, *Kenyon* (*Stamp* v. *Cooke*, 1 Cox, 236), and Lord *Loughborough* (*Lowndes* v. *Stone*, 4 Ves. 649), and perhaps at one period might have been regarded as prevailing; but at present the weight of authority is in favour of the stricter, and it is conceived the sounder, construction, which rests on *dicta* and decisions by Lord *Thurlow* (*Phillips* v. *Garth*, 3 B. C. C. 64), Lord *Eldon* (*Garrick* v. *Lord Camden*, 14 Ves. 385), and Sir *W. Grant* (*Smith* v. *Campbell*, 19 Ves. 404).

"RELATIONS."

GIFTS TO RELATIONS.

"Relations," how construed.

Gifts to relations were at first attempted to be impugned on the ground of uncertainty, and such, indeed, must necessarily have been their fate, unless a line could have been drawn restrictive of their almost illimitable range of objects. This has been effected by confining the gift to the relations who would take the personal estate under the statutes of distribution; *Thomas* v. *Hole*, Cas. Temp. Talb. 251; *Harding* v. *Glyn*, 1 Atk.

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noticed by the Vice-Chancellor. Agreeing, however, as it does with the principle of another decision of the same learned Judge, (*Jones* v. *Mitchell*, 1 Sim. & Stu. 290), the case may be considered as no unimportant accession to the authorities in favour of the heir. It leaves little doubt as to the manner in which, by the present Master of the Rolls at least, the point would be determined.

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469; *Rayner* v. *Mowbray*, 3 B. C. C. 234; which construction is now applied as well to gifts of real, as to those of personal estate; *Doe* v. *Over*, 1 Taunt. 263; and is not varied where the term is "near" relations. *Whithorne* v. *Harris*, 2 Ves. sen. 527; see also 19 Ves. 403.

"Nearest relations."

But a gift to *nearest relations* is confined to the next of kin, properly so called, exclusively of persons whom the statutes admit *jure representationis; Pyott* v. *Pyott*, 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 B. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400; unless where the testator subjoins explanatory expressions, shewing that he used the term in a wider sense. Thus a gift to nearest relations, "as sisters, nephews, and nieces," has been held to let in all the objects of distribution under the statute. *Stamp* v. *Cooke*, 1 Cox, 234.

Admission of relations of half blood.

As relations by the half blood are within the statute, so they are clearly comprehended in gifts to next of kin and relations; and a legacy to the next of kin of A. "of her own blood and family, as if she had died sole, unmarried and intestate," has received the same construction. *Cotton* v. *Scarancke*, 1 Madd. 45. Of course, a gift to next of kin or relations simply, does not extend to relations by affinity. *Maitland* v. *Adair*, 3 Ves. 231; *secus* where the term is "relations by blood *or marriage*." *Devisme* v. *Mellish*, 5 Ves. 529. A gift to next of kin or relations does not include the husband or wife; *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 Ves. 537; *Bailey* v. *Wright*, 18 Ves. 49; even though it be "among my next of kin, *as if I had died intestate*." *Garrick* v. *Lord Camden*, 14 Ves. 372.

— by affinity.

Distribution *per stirpes* and *per capita*.

The statutes of distribution not only fix the objects of a gift to relations, but also regulate the manner of their taking; it being settled, that, under such a gift, the distribution among next of kin and representatives of next of kin is *per stirpes*, and not *per capita; Pope* v. *Whitcombe*, 3 Mer. 689; see also *Stamp* v. *Cooke*, 1 Cox, 234; *Rowland* v. *Gorsuch*, 2 Cox, 187; *Lowndes* v. *Stone*, 4 Ves. 649; unless the testator has introduced into the gift expressions pointing at equality in the distribution, which are considered to require a distribution *per capita*, so that the children of deceased brothers and sisters take an equal portion with their uncles and aunts, and not their parents' shares merely; *Thomas* v. *Hole*, Cas. Temp. Talb. 251; *Green* v. *Howard*, 1 B. C. C. 31; *Phillips* v. *Garth*, 3 Id. 64; *Rayner* v. *Mowbray*, Id. 234; *Butler* v. *Stratton*, Id. 369; see also *Elliott* v. *Davenport*, 1 P. W. 83; and even, without any such expressions, persons equal in degree take *per capita* as under the statute.

"Poor relations," how construed.

A bequest to the most deserving of the testator's relations, *Doyley* v. *Attorney-General*, 4 Vin. Ab. 485, pl. 16, 2 Eq. Ca. Ab. 194, (E), pl. 15, or, it seems, to the testator's *poor* relations, receives the same construction as a gift to relations simply; *Widmore* v. *Woodroffe*, Amb. 636; *Anon.* 1 P. W. 376; though in earlier cases gifts to poor relations seem to have been

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extended to necessitous persons, being relations, beyond the statute. 2 Vern. 381; 1 Ves. jun. 231. In one instance, a gift to "poorest" relations was treated as charity, to be administered within the limits of the statute; Amb. 595; as was more recently a bequest for the purpose of "putting out our poor relations apprentices." *White* v. *White*, 7 Ves. 423. In a still later case, Sir *J. Leach*, M. R., held that a devise of real estate to trustees, in trust to pay the rents "to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and as such void within the stat. 9 Geo. 2, c. 36 (stated p. 27). *Hale* v. *Attorney-General*, Rolls, 28th July, 1829. See also *Brunsden* v. *Woolredge*, Amb. 507; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Attorney-General* v. *Price*, 17 Ves. 371.

Extent of power of appointing among relations.

It is to be observed, that a power of appointment created in favour of relations is not restricted to next of kin or their representatives, but the donee may appoint to more remote relations. *Harding* v. *Glyn*, 1 Atk. 469; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Forbes* v. *Ball*, 3 Mer. 437; *Grant* v. *Lynam*, 4 Russ. 292. But if from his neglect to exercise the power, the execution of the trust devolves upon the Court of Chancery, the ordinary construction prevails, as the discretion involved in the power being personal to, expires at the decease of, the donee, and the Court merely executes the trust, which, either expressly or by implication, follows the power. *Cole* v. *Wade*, 16 Ves. 27.

Period of ascertaining the objects.

Having ascertained generally who are the objects of gifts to next of kin and relations, the next step is to inquire at what period the description is to be applied: and here attention may be directed to the great difference, in point of construction, between gifts to children and gifts to other classes; the former, admitting an accession of fresh objects in the interval between the period of vesting and of possession or distribution (*vide ante*, p. 183); while, in regard to the latter, when the period of vesting has arrived, the door is closed against future accessions. Thus, if a devise or bequest is made to A. for life, and after his decease to his children; this lets in the children living at the testator's decease, and those who come into existence during A.'s life; on the other hand, where the gift is to A. for life, and after his decease to the testator's relations, the latter gift takes effect in favour of relations living at his decease, to the exclusion of those who might happen to come *in esse* during the life of A. *Doe* v. *Lawson*, 3 East, 278; *Cruwys* v. *Colman*, 9 Ves. 319; *Pope* v. *Whitcombe*, 3 Mer. 689; *Forbes* v. *Ball*, Id. 437.

Where relations at the time of distribution are meant.

In some instances, however, the term relations or next of kin, occurring in such a gift, has been held to apply to persons answering the description at the decease of the legatee for life, the period of distribution. It does so, according to Sir *Edward Sugden*, in all cases in which the gift is preceded by a power of selection or distribution in the legatee for life—a circumstance, certainly, not presenting any very obvious ground for departing from the ordinary construction. Indeed, the ordinary con-

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struction seems to be recommended by greater convenience, since it enables the donee, when exercising the power, to know precisely to whom it extends, which, of course, is impossible, if the objects are not ascertained until his decease. However, the case of *Harding* v. *Glyn*, 1 Atk. 469, recognised as it was by Sir *W. Grant* in the case of *Cruwys* v. *Colman*, 9 Ves. 324, probably would be considered to have established the rule propounded by the eminent author in question, as applied to powers of *selection;* but the case of *Pope* v. *Whitcombe*, 3 Mer. 689, which is also one of the cases cited by Sir *E. Sugden*, is a direct authority against his position, as applied to *powers of distribution.* The gift, in substance, was to A. for life, with a power to her to dispose of the residue among the testator's relations, in such manner as she should think fit; and the power not being exercised, it was held that the next of kin, *at the testator's decease*, were entitled. And this agrees with a previous decision at the Rolls, in the case of *Hands* v. *Hands* (*a*), 1 D. & E. 437, n. The result of the authorities, therefore, would seem to be, that a gift to relations or next of kin, preceded by a gift for life, with a power of selection to the legatee for life, applies to relations or next of kin at *his* decease; and that a gift to relations or next of kin, preceded by a life interest and a power of distribution to the legatee for life, applies to relations or next of kin at *the testator's* decease.

But where the power even of selection is not preceded by a life interest, and is made immediately exerciseable by an appointment taking effect *inter vivos*, the gift is necessarily confined to relations at the testator's decease (*b*). *Cole* v. *Wade*, 16 Ves. 27.

What circumstances postpone the period of ascertaining the objects.

The circumstance of the legatee for life being *one* of the next of kin at the testator's decease, has been decided not to form a ground for deferring to a future period the ascertainment of the objects of the gift, which therefore applies as ordinarily to next of kin at the testator's decease. *Holloway* v. *Holloway*, 5 Ves. 399. *Secus*, where the legatee for life is the *sole* next of kin, in which case the gift is held to embrace next of kin at the period of distribution, *i. e.* the decease of the legatee for life. *Jones* v. *Colbeck*, 8 Ves. 38. And where the gift to next of kin is to take effect in defeazance of a prior gift to a person, who, in the event of his surviving the testator, would be his sole next of kin, the term is construed to mean persons answering the description at a future period, and that period in

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(*a*) It is observable, that Lord *Eldon*, in *Wright* v. *Atkyns*, 19 Ves. 302, referred to this case as contradicting *Harding* v. *Glyn*—an intimation which cannot fail to put the reader on his guard against the too ready acquiescence in the scheme suggested in the text for reconciling them.

(*b*) Mr. *Roper*, 1 Treat. Leg. 102, has overlooked this distinction in his observations on the case.

general would be when the executory gift vests in possession. *Miller* v. *Eaton*, Geo. Coop. 272.

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Next of kin of a deceased person.

Where the gift is to the next of kin of a person who dies before the testator, the entire property (at least where there are no words severing the joint tenancy), vests in such of the objects as survive the testator. *Bridge* v. *Abbot*, 3 B. C. C. 224; *Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n. If it be to the next of kin or relations of a living person, of course the description cannot be applied at the death of the testator, or at any other period, during the life of such person. *Cruwys* v. *Colman*, 9 Ves. 319. It must await his death, and will vest in those who first answer the description, whether the distribution takes place then or subsequently. *Danvers* v. *Earl of Clarendon*, 1 Vern. 35.

Next of kin who shall be living, &c.

But it is clear that the circumstance of the gift being restricted to objects existing at a future period, as to next of kin who shall be living at the end of ten years from the testator's decease, makes no further variation in the construction than that of engrafting into their qualification this additional ingredient; for it has been well observed, that the testator means some class of persons, of whom it is doubtful whether they will live to the future period or not. Hence, it is a gift to such of the next of kin at the testator's decease as shall be living at the future period. *Spink* v. *Lewis*, 3 B. C. C. 355.

GIFTS TO REPRESENTATIVES, EXECUTORS, AND ADMINISTRATORS.

"REPRESENTATIVES," "EXECUTORS," AND "ADMINISTRATORS."

"Legal representatives," how construed.

The term "legal representative," used in relation to personal estate, properly designates the executors or administrators, who are, with respect to personalty, the representatives of the deceased testator or intestate, though, in a few instances, the term has been applied to next of kin. Thus, in the case of *Bridge* v. *Abbot*, 3 B. C. C. 224, where a testatrix bequeathed to certain persons, and, in case of the death of any of them before her, to his or her *legal representatives*, the next of kin were held to be entitled. So, in *Long* v. *Blackall*, 3 Ves. 486, the same construction was given to a bequest in a certain event to the testator's own *legal representatives*. And again, in *Jennings* v. *Gallimore*, 3 Ves. 146, where the expression was somewhat varied, being "*legal representatives according to the course of administration.*"

In the case of a gift to a person *and his legal representatives*, the latter are obviously words of limitation merely. *Lugar* v. *Harman*, 1 Cox, 250. And where a legacy was given to be divided among children who should be living at a future period, and the *legal representative or representatives* of him, her, or them who should be then dead—Sir *J. Leach*, V. C., considered that the words were used in this sense, being equivalent, he thought, to a direction to pay to the children or their representatives; at the same time observing, *that it was a sound rule of construction to understand words in their ordinary sense, unless controlled by a different intention appearing on the whole instrument. Price* v. *Strange*, 6 Madd. 159,

GIFTS TO REPRESENTATIVES, EXECUTORS, AND ADMINISTRATORS.

"Personal representatives," how construed.

(which compare with *Horsepool* v. *Watson*, 3 Ves. 383). In conformity to this doctrine, in a subsequent case, where a testator bequeathed a sum of 1000*l.*, in trust to pay the interest to his daughter for her separate use, free from the control of any husband, and directed that after her decease the same should pass by any will or disposition she might under her hand and seal make thereof, and for want thereof *should go to her personal representatives;* the same learned Judge (then occupying another judicial chair) held, that, in default of appointment, the legacy devolved to the husband of the daughter, as her administrator and personal representative. *Sabberton* v. *Skeels*, 1 Russ. & M. 587.

Executors or administrators not entitled for their own benefit.

This construction agrees with the earlier case of *Evans* v. *Charles*, 1 Anstr. 128, where an administrator was held to be entitled under the description of "personal representative" of a person who was dead when the will was made, and *for his own benefit.* The latter branch of the decision has, however, been much disapproved of. (See *Price* v. *Strange*, 6 Madd. 161). It is not only inconsistent with the principle of Lord *Eldon's* reasoning in the well-known case of *Ripley* v. *Waterworth*, 7 Ves. 425, but it is at variance with and may be considered as overruled by the late case of *Collier* v. *Squire*, 3 Russ. 467, where, by a marriage settlement, a sum of stock was settled upon trust for the intended wife for life, and after her decease for the intended husband, his executors, administrators, or assigns, in case he should survive her; but, in case he should die before her, then to transfer the stock as the husband should by deed or will appoint, and in case he made no appointment, then *to his executors or administrators.* The husband died in the lifetime of the wife, having left a will, but made no appointment of the fund, which was held to belong to his executrix, *as part of his general personal estate.* See also *Wellman* v. *Bowring*, 1 Sim. & Stu. 24, 2 Russ. 374, 3 Sim. 328, S. C. These cases have also overruled *Churchill* v. *Dibben*, Sugd. Pow. 289, n., as well as *Sanders* v. *Franks*, 2 Madd. 147, unless the latter case can be considered as distinguishable. Leaseholds were bequeathed to A. for life, and after her decease to such persons as she should by will appoint, and in default to the executors or administrators of A., *to and for his, her, or their own use and benefit;* Sir *T. Plumer*, V. C., held an administrator to be entitled for his own benefit by the force of these words. It is improbable that a bequest so expressed would now receive a similar construction, as the words in question seem too weak to warrant a departure from the ordinary rule, which, it must be remembered, was unsettled when this case was decided.

GIFTS TO FAMILY.

"Family," or "House," imports heir, when.

"FAMILY," AND "HOUSE."

The words "family" and "house" are of equivocal import, often varying their meaning according to the subject-matter. In *Chapman's case*, 3 Dyer, 333, it was held that the words "or else to remain to the house," in relation to real estate, signified family, "which should be intended the chief and most worthy and eldest person in the family," *i. e.* the heir. So,

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in *Counden* v. *Clerke*, Hob. 33, it is laid down, that, if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house. The same construction prevailed in a more recent case, where a testator devised all his lands, as well freehold as leasehold and copyhold, unto his mother, C. A., and her heirs for ever, in the fullest confidence that, after her decease, she would devise the property to his *family;* Sir *W. Grant*, M. R., was of opinion that the effect of this devise was to limit the property to the mother for life, with reversion to the testator's heir-at-law at his death. *Wright* v. *Atkyns*, 17 Ves. 255; and Lord *Eldon*, on appeal, confirmed his Honor's decision. (19 Ves. 143). The case being carried by appeal to the House of Lords, it was, however, there held that the mother took an estate in fee, the House not being called upon to pronounce who were the objects of the trust after her decease. *Wright* v. *Atkyns*, Turn. & Russ. 143. In this case, the gift purported to include leaseholds, but there were none; so that it was not necessary to discuss the construction of the word *family*, as applied to them, which, according to the authorities, possibly might have been different. Thus, in a case cited 1 Taunt. 266, it is said to have been decided at the Rolls, in 1732, that, under a limitation to the *family* of J. S., the real estates descend to the heir-at-law, the personal estate goes to the next of kin.

To C.'s "family to go in heirship for ever."

So, where A. devised lands unto his sister *C.'s family, to go in heirship for ever*, it was held that the eldest son and heir apparent of C. was entitled; though, in another part of the will, the word "family," applied to personal property, meant children; there being, it was said, no objection to the same word when applied to a different subject receiving a different construction. *Doe* v. *Smith*, 5 Mau. & Selw. 126.

"Family" held to mean children.

The word *family* has sometimes been construed to mean "children." Thus, in the case of *Barnes* v. *Patch*, 8 Ves. 604, a testator gave the remainder of his estate to be equally divided between "brother L.'s and sister E.'s *families*," and Sir *W. Grant*, M.R., decided that the will (which was held to carry real estate) vested the property in the *children* of the brother and sister.

"Family," synonymous with *relations*.

In other instances "family" has been treated as synonymous with *relations*. Thus, in the case of *Cruwys* v. *Colman*, 9 Ves. 319, a testatrix made her only sister whole and sole executrix to every thing she had for her own life, and willed that at her own death she bequeathed to those of her own *family* what she had it in her own power to dispose of that was the testatrix's, provided they behaved well to her. Sir *W. Grant*, M. R., held that the words, "her own family," were equivalent to her own *relations;* observing, that the word family might, according to the context, have different significations in different wills.

So, in the recent case of *Grant* v. *Lynam*, 4 Russ. 292, where a testator bequeathed a leasehold house to his wife for life, with a power of

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disposing of the same after her decease, "to any one of my own *family* she may think proper," Sir *J. Leach*, M. R., held, that the word "family" was synonymous with relations; and, therefore, an appointment to a relation, though not next of kin, was authorized by the power.

GIFTS TO HEIR.

"HEIR," *in relation to Personalty.*

"Heir," in relation to personalty, how construed.

Heir, though a word of well-defined and technical meaning, often denotes, in relation to personalty, those who by law succeed thereto on the decease of an intestate owner, who, in a general, popular sense, may be considered the "heir," in respect of such property. Thus, where a testator bequeathed to A. 200*l.*, "and, failing him by decease before me, *to his heirs*," the legacy was held to belong to the next of kin of A. living at the death of the testator. *Vaux* v. *Henderson*, 1 Jacob & Walker, 388, n.; see also *Holloway* v. *Holloway*, 5 Ves. 399. But these cases must not be understood to warrant the general proposition, that the word "heirs," in relation to personal estate, imports next of kin, especially if real estate be combined with it. Thus, in the case of *Gwynne* v. *Muddock*, 14 Ves. 488, where a testator gave all his real and personal estate to A. for life, adding, after her death his "nearest *heir-at-law* to enjoy the same;" Sir *W. Grant* held, that the heir-at-law took the real and personal estate, and not the realty only, the testator having blended both in the gift. And even where the entire subject of gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense; nor will the construction be varied by the accident that the description applies to a plurality of persons, since any number of co-heirs make but one "heir." See 2 Lord Raym. 829. Thus, the words, "to my *heir* 4000*l.*," were recently held to entitle three co-heiresses of the testator jointly; Sir *J. Leach*, M. R., neatly observing, "Where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir.'" *Mounsey* v. *Blamire*, 4 Russ. 384.

CHILDREN, NEXT OF KIN, &c. OF SEVERAL PERSONS.

Suggestions as to gifts to the children, next of kin, &c. of *several* persons.

It may be useful to close the present section with a brief statement of some points respecting gifts to the children, heirs, next of kin, or relations of a plurality of persons. In framing such gifts care is requisite, in order to avoid various questions; such as—

1st. Whether the children, next of kin, &c., of the several persons named, are to take *per capita* or *per stirpes*, especially if the latter is intended; since otherwise the distribution would be *per capita*, not only where the gift is thus—to the children of A. and of B.; *Malim* v. *Keighley*, 2 Ves. jun. 333, 529; see *Lady Lincoln* v. *Pelham*, 10 Ves. 176: but also where it is to the children of A. and to the

children of B.; *Malcolm* v. *Martin*, 3 B. C. C. 50; and if there should be children of one only, they will take the whole, Id.; and even if there should be only one child of one of the persons named, and the terms of the bequest might seem exclusively adapted to a plurality of objects, the entirety will vest in such only child; see *Wicker* v. *Mitford*, 3 B. P. C. Toml. ed. 442;—a construction which accords with that given to the general statute of distributions (*vide post*), which has been styled a "Parliamentary Will," 2 P. W. 443, and exhibits a similar omission to provide against the event of there being an only child. *Palmer* v. *Garrard*, Pre. Ch. 21.

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2nd. Whether it is intended that the gift shall apply to the heirs, next of kin, &c. of the several persons *respectively*, or to persons who shall answer to the character of children, heirs, &c. of *both or all* (*a*). A limitation to the right heirs of persons who are actually husband and wife, and who are not related in blood, is held to mean heirs, *i. e.* children, of both. Thus, where a testator devised to H., daughter of A., in tail, with remainder to such child or children as the wife of the said A. was then *encient* with, in tail, with remainder *to the right heirs of A. and M. his wife for ever*, it was contended, that the limitation to the right heirs of A. and M. was intended to give an estate in moieties to the heirs of each; but the Court held, that, in order to entitle any person, it was necessary that he or she should *answer the description of heir of both*, which could only apply (they being strangers in blood) to a child of both, the husband and wife being in contemplation of law one person only. *Roe* v. *Quartley*, 1 Durn. & E. 630. In a recent case, a question was raised, whether a devise in favour of the next of kin of the testatrix's late father and mother, his or her heirs and assigns for ever, and if more than one, as tenants in common, applied to the next of kin of these persons (who were not related) *respectively*, or persons answering to the description of next of kin of *both*. The testatrix was a spinster of very advanced age. Lord *Lyndhurst*, C., decided in favour of the latter construction, remarking, that the testatrix contemplated that the next of kin might be *one* individual or more, which was inconsistent with the supposition that she meant next of kin of the father and next of kin of the

Heirs of husband and wife construed to mean children.

Next of kin of testatrix's late father and mother.

(*a*) With respect to *children*, of course this question could not arise in regard to more than two, nor even then, if the individuals named were of the same sex, or, being of different sexes, were not husband and wife *de facto*, or capable of becoming such *de jure*. It has never been decided whether a gift to the children of A. and B. (a man and woman not related in blood), means children proceeding from them both or respectively.

In defence of the seemingly useless plan, here and elsewhere adopted, of suggesting points without attempting the solution of them, it may be observed, that it serves to invite the attention of the draughtsman, in order that he may prevent, by explicit declaration, the occurrence of any such questions.

CHILDREN, NEXT OF KIN, &c. OF SEVERAL PERSONS.

mother, as they were not related. *Pycroft* v. *Gregory*, 4 Russ. 526. (But might he not have contemplated the possibility of the failure of the next of kin of one?)

3rd. It should also be distinctly shewn, that the children, &c. of *all* are intended, and not children in one instance and parents in the others, which is often the grammatical construction of words which are meant to have a different effect; for instance, a gift to "my brother and sister's children" will be read as applying to the brother and the children of the sister, and not to the children of both, as no doubt is intended; *Doe* v. *Joinville*, 3 East, 172; *Lugar* v. *Harman*, 1 Cox, 250; and (what is still worse) the brother would take only a share equal to that of one of the sister's children. *Blackler* v. *Webb*, 2 P. W. 383. The expression should have been, to my brother's and sister's children, or to the children of my brother and of my sister.

4th. If a contingency is to be introduced into the qualification of the objects, such as that of their being in existence at a given period, it should be made clearly apparent that it applies to the objects themselves, and not to the parents' ancestors, &c., though such, it appears, would be in general the adjudged construction; since a gift "to the children of my brothers and sisters, who shall be living at the time of my decease," has been held to import children who shall be living, and not the children of brothers and sisters who shall be living; as the latter reading re-models the sentence, making it children of *such* of my brothers, &c. *Barker* v. *Lea*, 3 Ves. & Bea. 113.

TENANCY IN COMMON.

XVII. WHAT WORDS CREATE A TENANCY IN COMMON.

Joint tenancy, when created.

A gift to several persons simply, will, generally speaking, make them joint tenants, whether the subject be real or personal estate, without excepting even pecuniary legacies and residuary bequests, which have been sometimes supposed distinguishable. *Cray* v. *Willis*, 2 P. W. 529; *Barnes* v. *Allen*, 1 B. C. C. 181; *Stuart* v. *Bruce*, 3 Ves. 632; *Whitmore* v. *Trelawny*, 6 Ves. 129; *Crooke* v. *De Vandes*, 9 Ves. 197. In creating a tenancy in common, it is usual to express affirmatively and negatively that the co-devisees or co-legatees shall be tenants in common, and not joint tenants; but such explicitness of declaration is not essential. The words, "equally to be divided," and "share and share alike," will produce the same effect; *Doe* v. *Vaughan*, 1 Dowl. & Ryl. 52; *Clayton* v. *Lowe*, 5 Barn. & Ald. 636; having been adjudged, indeed, adequate to sever the tenancy, even in the instance of a deed. *Rigden* v. *Vallier*, 2 Ves. sen. 252. In a will much slighter expressions will suffice. Thus, devisees or legatees have been held to be tenants in common under a gift to several persons *equally*; *Warren* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10; or even to them *respectively*; *Heathe* v. *Heathe*, 2 Atk. 121; or where the limitation was to the heirs of the devisees as they

Expressions which create a tenancy in common.

should "severally" die; *Sheppard* v. *Gibbons*, 2 Atk. 441; also, where the gift was expressed to be to A. and B. "*between them;*" *Lashbrook* v. *Cock*, 2 Mer. 70, 118; see also *Perkins* v. *Baynton*, 1 B. C. C. 118; or to be enjoyed "*alike.*" *Loveacres* v. *Blight*, Cowp. 352; see also *Thorowgood* v. *Collins*, Cro. Car. 75. And a direction introduced into a bequest of leaseholds, that the legatees should bear an annual charge *in moieties; Kew* v. *Rouse*, 1 Vern. 253; and words referring to the "shares" of co-residuary legatees; *Dodson* v. *Day*, 3 B. C. C. 405; have respectively been held to make them tenants in common. TENANCY IN COMMON.

The great characteristic of a joint tenancy is survivorship; which, however, is liable to be defeated by a severance of the tenancy; and consequently a qualified gift to the survivor of several co-devisees or co-legatees, in the event of the death of either, under certain circumstances, being exempt from such hazard, is consistent with, and therefore does not negative the construction of, a joint tenancy. *Barnes* v. *Allen*, 1 B. C. C. 181. Nor does an express gift of part of the property to the legatees, as tenants in common, necessarily imply an intention that they shall take, in a similar manner, other parts not so expressly given. *Jackson* v. *Jackson*, 7 Ves. 535. Effect of a qualified gift to survivors.

Sometimes a gift contains expressions respectively pointing at a joint tenancy and a tenancy in common. In such case one must yield, and the former, it is probable, would generally be selected, on account of the well-known bias in favour of a tenancy in common. See *Perkins* v. *Baynton*, 1 B. C. C. 118, (where the expression was, "jointly and between them"). In some instances the seeming discrepancy has been avoided by holding the co-legatees to be joint tenants of a particular interest (as for life), and tenants in common of the ulterior interest. *Gardiner* v. *But*, 3 Madd. 425; *vide* also, as to devisees in tail, *post*. But a legacy to two, to be equally divided when they should arrive at twenty-one, has been held to make the legatees tenants in common, immediately, so that, on the decease of one under age, her share went to her representatives, and not to the survivor. *Jolliffe* v. *East*, 3 B. C. C. 25. Contradictory expressions.

The rule which construes a gift to two or more simply as creating a joint tenancy, applies indiscriminately to gifts to individuals and classes, including, it should seem, gifts to children, in disregard of Lord *Hardwicke's* objection, in *Rigden* v. *Vallier*, 2 Ves. sen. 258, to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship, which does not appear to have been attended to. Gifts to classes.

However, a gift by will, under which all the members of the class are not necessarily entitled at the same instant of time, but which vests the property in the existing objects, with a liability to be divested *pro tanto* in favour of after-born objects, was recently decided, by reason of the different periods of vesting, to create a tenancy in common. The case was as follows:—Stock in the public funds was bequeathed to A. for life, and after her de- Different periods of vesting held to be inconsistent with a joint tenancy.

TENANCY IN COMMON.

Tenancy in common where the gift vests in the objects at different times.

cease the capital to the children when they arrived at the age of twenty-one years. It was contended, that the legatees were tenants in common, according to the position in Coke on Litt. 188. a., that "if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time and the other moiety vested at another time." Sir *L. Shadwell*, V. C. said, "It is contrary to the rule of law that persons who are to take at different times can take as joint tenants; the property must vest at once. From the necessity of this case, the children who attained twenty-one must take as tenants in common." *Woodgate* v. *Unwin*, 4 Sim. 129.

It is observable, that, in the case of *Stratton* v. *Best*, 2 B. C. C. 233, a contrary rule was applied to the limitations of a deed. By a marriage settlement lands were limited in trust for the intended husband for ninety-nine years if he should so long live, with remainder (subject to a power of appointment) in trust for the intended wife for life, with remainder, in trust for all and every the child and children of the husband, begotten on the body of the intended wife, and their heirs for ever. It was contended, that, as the shares of children would vest at different times, they were tenants in common; but Lord *Thurlow* decided contrarily, observing, that, whether the settlement was to be considered as the conveyance of a legal estate [*qu.* to the trustees?] or a deed to uses, would make no difference, *and that the vesting at different times would not prevent its being a joint tenancy.* It is to be regretted that this case was not cited to the Vice-Chancellor. In the case put by Lord *Coke*, the instrument was a demise at common law, and his doctrine has been usually considered as not applying to conveyances to uses or to wills; but both Lord *Thurlow* and Sir *L. Shadwell* seem to have concurred in disregarding this distinction, though their decisions agree in no other point.

Trusts arising by implication from powers of distribution and selection.

Where a trust is raised by implication from a power of *distribution* among a class of defined objects, (*vide ante*, p. 150), they take as tenants in common; *Reade* v. *Reade*, 5 Ves. 744; *Casterton* v. *Sutherland*, 9 Ves. 445; *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431; overruling *Maddison* v. *Andrews*, 1 Ves. sen. 157; but where, from a power of *selection*, it is probable that the objects of the implied gift would be held to be joint tenants.

And here it may be observed, that the decease, in the lifetime of the donee, of any member of a class to whom a testamentary power of selection or distribution extends, does not defeat the power *pro tanto*, but the entirety may be appointed to the survivors. *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299. See also *Butcher* v. *Butcher*, 9 Ves. 382; 1 Ves. & Bea. 79. Sir *Edward Sugden*, however, is of opinion, that this doctrine is confined to cases in which the entire property vests in the survivors; and that, if the objects of the gift, in default of appointment, take as tenants in common, among whom there is no survivorship, the power, by the decease of any one or more of the objects, is defeated

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pro tanto; (Treat. Pow. 5th ed. 479); but it may be doubted whether there is any solid ground for such a distinction between the effect of survivorship and lapse; and the case of *Reade* v. *Reade*, 5 Ves. 774, which is the authority cited by this eminent writer, has been characterized by Lord *Eldon*, (1 Ves. & Bea. 92), and is admitted by himself, to be unintelligible. The question would be altogether avoided by holding (as was done by Sir *T. Plumer*, M. R., in one instance,) an implied gift arising out of a power of distribution among children to apply to children *living at the death* of the donee. *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431; (but which compare with *Malim* v. *Barker*, 3 Ves. 150). If, in *Kennedy* v. *Kingston*, the Master of the Rolls was authorized to say that the power was exerciseable among children living at the death of the donee only, then his decision was clearly right; for it seems to be an admitted principle, that the period of ascertaining the objects of the power and of the gift must be the same; on which ground it was lately held, that a gift in favour of children, implied from a power of *bequeathing* to children, was confined to children living at the death of the donee, this being obviously the period at which the objects of an appointment *by will* are to be ascertained. *Walsh* v. *Wallinger*, 2 Russ. & M. 78.

Implied gift to children held to mean children at death of donee.

Estates tail are the subject of some peculiar distinctions in regard to the nature of the tenancy subsisting between the co-devisees. If they are persons who may have common heirs of their bodies, being husband and wife, or a man and woman who may then lawfully marry, they are tenants in tail by entireties, or jointly, as the case may be. Where, however, the devise is to persons who are not husband and wife, or who cannot lawfully marry, (as in the instance of a devise to the children of A. in tail), so that they cannot have or be presumed to have common heirs of their bodies, the devisees are tenants in common in tail. Co. Litt. 184. a.; *Huntley's case*, Dy. 326 a; *Cook* v. *Cook*, 2 Vern. 645; *Perry* v. *White*, Cowp. 777. But even then the joint tenancy takes effect so far as it can, the construction of the devise being that the devisees are *joint tenants for life, with several inheritances in tail. Wilkinson* v. *Spearman*, in Dom. Proc. cit. 2 Vern. 545, S. C. cit. 2 P. W. 530. See also Co. Litt. 182. a.

Co-devisees in tail, tenants in common, when.

The notice of these points has somewhat anticipated the observation, that where real estate is limited by deed or will for an estate of inheritance or freehold concurrently to two persons who are husband and wife, they take by entireties and not as joint tenants, and the lands thus limited devolve to the survivor, unaffected by the separate alienation of either husband or wife, whose incapacity singly to exercise the *jus disponendi* over any part of the property is the consequence of their unity of person, which makes their concurrence essential to any such act. Co. Lit. 187. a.; *Doe* v. *Parratt*, 5 Durn. & E. 652.

Tenants by entireties.

Another consequence of this unity of person (and one which it is often important for the draftsman to bear in mind), is, that where property is

Husband and wife regarded as one person.

GIFTS TO RELATIONS.

given to a husband and wife concurrently with any other person or persons, they are computed as and take the share of one only. *Lewin* v. *Cox*, Moore, 558, pl. 752; *Anon.* Skinn. 182; Co. Litt. 187. a.

DEVISES ENLARGED TO A FEE BY IMPLICATION.

XVIII.—INDEFINITE DEVISE COMPRISES THE FEE, WHEN—AS TO THE ABSOLUTE INTEREST IN LEASEHOLDS.

Indefinite devise passes only an estate for life.

A devise of freehold or copyhold messuages, lands, tenements, or hereditaments, either in general terms, or by a local or other particular description, not including the word "estate" or "property" (*a*), or any equivalent expression, will carry only an estate for life, though the testator may have shewn, by expressions, in the introductory part of the will, an intention to dispose of his whole estate; *Denn* v. *Gaskin*, Cowp. 657, S. C. Doug. 731; *Doe* v. *Wright*, 8 Durn. & E. 64; *Doe* v. *Allen*, Id. 497; or may have given a nominal legacy to his heir apparent or presumptive; *Roe* v. *Bolton*, 2 Bl. 1045; *Right* v. *Sidebotham*, Doug. 730; *Roe* v. *Daw*, 3 Mau. & Selw. 518; or may have intimated an intention wholly to disinherit him; *Awse* v. *Melhuish*, 1 B. C. C. 519; *Right* v. *Compton*, 9 East, 267; or though the devise is to a class, including the

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Operation of the words "estate" and "property" to confer a fee.

(*a*) These words will carry the fee, though associated with words of locality, or other expressions pointing at the corpus of the land, as "my *estate* at or in A.;" Amb. 181; Forrest. 157; 2 P. W. 523; 2 Atk. 37; 1 Durn. & E. 411; 6 Taunt. 317; 3 Russ. 145; or, "all that *estate* I bought of A.," 2 Ves. sen. 48; or, "my estate of A.;" 4 Dow, 92; "my *estate*, or lands, &c. called by the name of the Coal Yard, in the parish of St. Giles, London," 7 East, 259; or, "my *estate* consisting of thirty acres, with the dwelling-house, &c. situate at ————, now in the occupation of A." 3 Moore, 563. See also 7 Taunt. 35. And the introduction elsewhere in the will of the word "estate," in devises expressly creating an estate in fee, or an estate for life, does not vary the construction of the same word used in an indefinite devise. 6 Taunt. 317—410; 3 Russ. 145. In some instances, the word "estate" has been held to carry a fee, where employed to designate a subject antecedently devised by a descriptive term not extending to the testator's interest, as where a testator devises lands to A. for life, and after his decease gives "*the said estate*" to B. 4 Mau. & Selw. 366; 6 Taunt. 317; but see 8 East, 141; *vide* a converse case, 3 Barn. & Adolph. 473. The last decision, and more especially the case of *Doe* v. *Clarke*, 1 Cromp. & Mees. 39, which is less susceptible of being referred to special grounds, strongly injoin caution in applying the rule which reads the words "estate" or "property," under various combinations of phrases, as carrying a fee.

heir, as to the testator's children; *Dickins* v. *Marshall*, Cro. El. 330; *Doe* v. *Tucker*, 3 Barn. & Adolph. 473; or to one or more of a class of devisees to be nominated by another, as to such son or sons of A. as he shall by will appoint; *Fairfax* v. *Heron*, Pre. Ch. 67; or though the devise contains words importing equality of division; *Goodwyn* v. *Goodwyn*, 1 Ves. sen. 227; (a very weak ground certainly for varying the construction); or though there is in another part of the will or in the immediate context a devise *expressly for life*, affording the argument, therefore, that the testator meant something different by an *indefinite* devise; *Goodtitle* v. *Edmonds*, 7 Durn. & E. 633; *Doe* v. *Clarke*, 2 New Rep. 343; (one of such express devises being an antecedent gift to the heir of the lands in question; *Awse* v. *Melhuish*, 1 B. C. C. 58); or though the testator, after describing the land, adds, "which I purchased for 600 guineas" (this being the price he paid for the inheritance); *Doe* v. *Parratt*, 3 Barn. & Adolph. 469; notwithstanding the occurrence of any or probably of all these circumstances, it is indisputably clear that an indefinite devise will confer only an estate for life.

DEVISES ENLARGED TO A FEE BY IMPLICATION.

This rule of construction is entirely technical, being at variance with the popular notion, which regards the gift of the corpus of any subject, without discrimination between real and personal estate, as comprehending all the testator's interest therein. A conviction that the construction is hostile to the intention of testators has induced the Courts to lend a willing ear to grounds for departing from it, whenever a plausible pretext for their doing so could be offered. Hence have arisen the various classes of cases in which indefinite devises have been enlarged to a fee by implication, which are too numerous to receive more than a very slender notice. The principal admitted grounds for such enlargement are—

Grounds for enlarging indefinite devise to a fee.

First. Where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, in which case he takes an estate in fee, because he might otherwise be damnified by the estate passing from him before he is reimbursed the sum expended; and the strong improbability of loss from the disparity in the amount of the sum charged relatively to the value of the land does not negative the implication. *Moone* v. *Heaseman*, Willes, 140; *Doe* v. *Holmes*, 8 Durn. & East, 1; *Goodtitle* v. *Maddern*, 4 East, 496. Nor, for the same reason, does the futurity or contingent nature of the charge, though the contrary has been sometimes advanced. *Merson* v. *Blackmore*, 2 Atk. 341; *Doe* v. *Allen*, 8 Durn. & East, 497. In the recent cases of *Abrams* v. *Winshup*, 3 Russ. 350; and *Doe* v. *Phillips*, 3 Barn. & Adolph. 753, the charge was in effect contingent, (being liable to failure in the event of the devisee's dying before majority), though not in terms, and no attempt was made to found a distinction on this circumstance. Indeed, as the *possibility* of loss, which is the ground of the enlargement of the estate,

Charge of a gross sum on the devisee.

As to *contingent* charges.

DEVISES ENLARGED TO A FEE BY IMPLICATION.

evidently applies as well in the instance of a contingent as in that of an absolute charge, any such attempt, it is conceived, must have failed.

So, it is wholly immaterial whether the direction to the devisee is simply to pay, or to pay *out of the land*. *Doe* v. *Snelling*, 5 East, 87.

As to devisee being also executor.

Where the devisee, who is directed to pay the testator's debts, is also appointed executor, the injunction is considered not to have relation to the duty, incidental to an executorship of discharging the debts, but to have been imposed on him in the character of devisee of the land, in which, therefore, he takes a fee. *Dolton* v. *Hewen*, 6 Madd. 9; also *Doe* v. *Phillips*, 3 Barn. & Adolph. 753.

No enlargement of *express* estates.

The rule under consideration, however, is confined to *indefinite* devises; for, where the direction to pay is imposed on a person taking an *express* estate for life; (*Goodtitle* v. *Edmonds*, 7 Durn. & E. 635; see also *Willes* v. *Lucas*, 1 P. W. 474); or an estate tail, whether express or arising constructively by implication from words introducing the devise over; *Denn* v. *Slater*, 5 Durn. & E. 535; *Doe* v. *Owens*, 1 Barn. & Adolph. 318; it is wholly inoperative to enlarge such estate.

Distinction where the charge is upon the land.

It is well settled, that the mere imposition of a burthen on the land (no mention being made of the person by whom it is to be borne) has not the effect of enlarging the estates of any of the devisees; as in the instance of a devise to A. after debts and legacies are paid, or subject to or charged with the payment of debts and legacies, which clearly confers only an estate for life. *Denn* v. *Moor*, 5 Durn. & East, 558, S. C. in Dom. Proc. 1 Bos. & Pull. 247; see also *Fairfax* v. *Heron*, Pre. Ch. 67. And though, undoubtedly, two cases may be adduced, (*Doe* v. *Richards*, 3 Durn. & E. 356; *Gully* v. *Bishop of Exeter*, 12 Moore, 591), in which devises seeming to belong to this class have been held to carry the fee, yet the former professedly recognised, while it evidently departed from (*a*), the principle which distinguishes between charges on the land merely, and on the devisee in respect of the land; and, in the latter case, the Lord Chief Justice (*Best*) broadly laid it down, that every charge on the land without distinction converted an indefinite devise into a gift of the fee—a position which is so completely at variance with prior adjudications, that its advancement in the case cannot but deprive it of all authoritative weight. It is satisfactory to be able to oppose to this incongruous decision a more recent one conforming exactly to the rule before stated. *Doe* d. *Clarke* v. *Clarke*, 1 Cromp. & Mees. 39.

— As to annual charges.

The same general doctrine applies to *annual* charges, which, if made payable by the devisee of an undefined estate, will enlarge that estate to a fee, whether the will directs the annual sum to be paid by the devisee simply, or by the devisee *out of the land*. *Spicer* v. *Spicer*, Cro. Jac. 527;

(*a*) But see 1 Cromp. & Mees. 41.

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Baddeley v. *Leapingwell*, 3 Burr. 1533; *Jenkins* v. *Jenkins*, Willes, 650; *Goodright* v. *Stocker*, 5 Durn. & East, 93; *Right* v. *Compton*, 9 East, 265, overruling *Ansley* v. *Chapman*, Cro. Car. 157. And it seems to be immaterial that the current income of the property exceeds the annual sum charged, unless the incumbrance ceases with the estate of the devisee; because, leaving out of consideration possible fluctuations in value, the devisee might, notwithstanding such excess, be damnified, if the annuity should happen to endure beyond his life estate. Where the annuity and the estate of the devisee are both indefinite, an alternative presented itself either to restrain the annuity to the life of the devisee of the land, or enlarge the estate of the devisee of the land to a fee; and the latter branch was chosen as best subserving the intention. Where there is a devise to a person expressly for life, he paying an annuity to another also expressly for life, the direction to pay the annuity is inoperative (as we have seen the charge of a gross sum to be under similar circumstances,) to enlarge the devisee's estate; and in such a case it seems that the annuity continues a burthen on the land during the life of the annuitant, even after the determination of the estate of the devisee, who was, in the first instance, made the vehicle of payment. *Willis* v. *Lucas*, 1 P. W. 474.

In consistency with the principle applicable to charges of gross sums, the imposition of an annuity on the lands, in terms which do not make the payment of it the personal duty of any devisee, leaves the estates created by the will wholly unenlarged and unaffected; (see *Doe* v. *Clayton*, 8 East, 141); which doctrine is so well settled that the difficulty of reconciling every decision (see *Andrew* v. *Southhouse*, 5 D. & E. 291) induces no hesitation in acceding to it.

Enlargement to a fee by the effect of a devise over.

Secondly. Another ground for holding an implied fee to pass by an indefinite devise, is, its being succeeded by a gift over in the event of the devisee dying under the age of twenty-one years; such devise over being considered to denote that the prior devisee is to take, or rather to retain, the fee in the alternative event of his attaining the age in question; since, in any other supposition, the contingency on which the ulterior devise is made dependent, is very absurd. *Doe* v. *Cundall*, 9 East, 600; *Marshall* v. *Hill*, 2 Mau. & Selw. 608; *Doe* v. *Coleman*, 6 Price, 179; overruling *Fowler* v. *Blackwell*, 1 Com. 353. The force of this reasoning is somewhat diminished where the devise over confers an estate for life only; but the rule clearly applies to such cases, (see *Frogmorton* v. *Holiday*, 3 Burr. 1618); as it also does where the death of the prior devisee is to be under any other age than majority; (see *Doe* v. *Coleman*, 6 Price, 179); and it is not restrained (as is sometimes laid down) to devises to children; (Id.); nor, lastly, to cases in which death, under the prescribed age, is the only event on which the estate is given over. For instance, an indefinite devise would be enlarged to a fee, by the effect of

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a devise over, to take effect on the prior devisee dying under age, *and without leaving lawful issue*. *Toovey* v. *Bassett*, 10 East, 460.

In fact, the implication might plausibly be contended for, even where the contingency with which death is associated does not relate to the age of the devisee, as in the instance of a devise to A., and, if he dies in the lifetime of B., then to B. in fee. See *Moone* v. *Heaseman*, Willes, 138. However this may be, authority forbids the extension of the doctrine to cases in which the devise over in fee arises on a collateral event, wholly unconnected with the decease of the prior devisee; for, where lands were devised to the testator's wife for life, with remainder to A. and B., as tenants in common; and the testator provided, that, in case C. should disturb his said wife in the enjoyment of the premises, the same should go to D. in fee; it was held, that A. and B. took estates for life only. *Roe* v. *Blackett*, Cowp. 235.

It is also abundantly clear that where an indefinite devise is limited in defeazance of, or in substitution for, a previous devise in fee, (being the converse of the cases just mentioned), no enlargement of estate takes place. Thus, if lands are devised to A. and his heirs, and, in the event of his dying under twenty-one and without issue, to B., B. will take an estate for life only. *Middleton* v. *Swain*, Skinn. 339; *Beviston* v. *Hussey*, Skinn. 385; *Fairfax* v. *Heron*, Pre. Ch. 67; *Doe* v. *Holmes*, 2 Wils. 80 (*a*). Indeed, the seeming absurdity, that a testator should defeat an estate in fee, for the purpose of substituting an estate for life, (which would be the ground of the argument for expanding the latter to a fee in such case), is wholly avoided by holding the prior devise to be defeated *pro tanto* only, which appears to be the sound construction.

Trustees take a fee, when.

Thirdly. The remaining class of indefinite devises conferring a fee consists of those in which a trust is created requiring that the devisee should take the inheritance. The doctrine which assigns to devisees in trust an estate exactly commensurate with the exigencies of the trust has long been familiar, but is often perplexing in its application on account of the difficulty of pronouncing what is precisely the quantity or measure of estate which the purposes of the trust require. See *Morrant* v. *Gough*, 7 Barn. & Cress. 206. The notice of a few points, by way of example, is all that can be attempted. If trustees are to convey, of course they take the fee; *Doe* v. *Field*, 2 Barn. & Adolph. 564; and a trust to sell will vest in them an estate equally extensive; *Murthwaite* v. *Jenkinson*, 2 Barn. & Cress. 357; but a mere charge of debts and legacies will not constructively give them an estate. *Kenrick* v. *Lord Beauclerk*, 3

(*a*) As to the substituted devise for life defeating the prior fee *pro tanto*, *vide ante*, p. 170.

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Bos. & Pull. 178. An unrestricted power of leasing would afford a strong argument for vesting the fee in the trustees; *Doe* v. *Walbank*, 2 Barn. & Adolph. 554; and so, it seems, would the circumstance of leaseholds (the legal estate in which was given to and necessarily remained in the trustees,) being combined with the freehold in the devise. *Houston* v. *Hughes*, 6 Barn. & Cress. 403.

Trust to *pay* rents, &c., how construed.

An established distinction is that a direction to trustees to *pay* the rents to the person who is beneficially to receive them, will vest in the trustees the legal ownership; *Robinson* v. *Grey*, 9 East, 1; but a trust *to permit and suffer* him to receive the rents has no such effect. *Right* v. *Smith*, 12 East, 455; *Gregory* v. *Henderson*, 4 Taunt. 772. Where both expressions are used, the latter prevails (*a*); hence the words "to pay *or permit or suffer*" carry the estate to the beneficial devisee. *Doe* v. *Biggs*, 2 Taunt. 109. Where, in addition to the direction to permit and suffer the rents to be received, the testator expresses another purpose, requiring that the trustee should retain the estate, as the preservation of contingent remainders, the property remains in him as it would have done if such purpose had stood alone. *Biscoe* v. *Perkins*, 1 Ves. & Bea. 485.

Estate of trustees restricted to infancy or coverture.

It should seem, that, in general, where lands are devised to trustees, or even to them and their heirs, in trust to apply the rents for the benefit of a minor until his age of twenty-one years, and then in trust for him in fee, or where the devise is in trust for the separate use of a female for life, and after her decease in trust simply for the ulterior objects of the testator's bounty, the estate of the trustees is limited to and terminates with the minority or coverture (actual or possible) for the protection of which the trust estate was evidently created. *Nash* v. *Coates*, 3 Barn. & Adolph. 839.

Limitation *to the use* of the trustees.

Of course, a testator may, if he thinks proper, vest the estate in his trustees without assigning to them any duty to perform, and such would unquestionably be the effect of a devise to the *use* of the trustees in trust for the beneficial objects. *Symson* v. *Turner*, 1 Eq. Ca. Ab. 303, pl. 1, n.; *Harris* v. *Pugh*, 12 Moore, 577; also *Doe* v. *Field*, 2 Barn. & Adolph. 564. But even a limitation to the *use* of the trustees will, it seems, if the extent or quantity of their estate is not expressly defined, admit of being enlarged or restricted by the nature of the trust. *Venables* v. *Morris*, 7 Durn. & East, 342, 437; *Curtis* v. *Price*, 12 Ves. 89; and see *Hawkins* v. *Luscombe*, 2 Swanst. 375.

ABSOLUTE INTEREST IN LEASEHOLDS.

Absolute interest in leaseholds passes, when.

The doctrine which requires words of limitation, or some corresponding or equivalent demonstration of intent, in order to vest in the devisee the

(*a*) As to this principle, *vide ante*, p. 153.

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testator's whole estate or interest, does not apply to leaseholds for years, which, however long, absolutely and entirely pass under a simple gift of messuages, or other such descriptive appellation. Thus, if a man, who is possessed of a term of 1000 years in Whiteacre, devises, or rather bequeaths, in these words—"I give Whiteacre to A.," the entire term will (the executors' assent being obtained) pass to the legatee, and positive intention must be evinced in order to give to the bequest a more restricted operation.

Leaseholds for lives.

The same rule of construction might seem to apply to leases for lives; since the doctrine of general occupancy, which regulated the destination of such property in the absence of a special occupant, necessarily supposed that words of limitation (which, when applied to estates *pur autre vie*, are merely the nomination of a special occupant) are not requisite to pass the whole estate; and accordingly we find that where lands were devised to A. for the life of B., and A. died, living B., the executor or administrator of A. was held to be entitled. *Phillips* v. *Phillips*, 1 P.W. 34. In the late case of *Doe* v. *Robinson*, 2 Mann. & Ryl. 249, S. C. 8 Barn. & Cress. 296, however, a notion seems to have prevailed that words of limitation are necessary in order to vest the entire estate *pur autre vie* in the devisee. The facts were briefly as follow:—The Bishop of D. demised certain lands to A., his heirs and assigns, during the natural lives of B, C., and D., and the life of the survivor. A., by will, devised two closes, part of the demised lands, to his daughter, E. R., without words of limitation, and the residue of his estate to his son. It was held that E. R. (who died during the continuance of the lease) took an estate for her own life only, and that the ulterior interest passed by the residuary clause. Mr. Justice *Bayley*, after quoting the terms of the 12th sect. of the statute of frauds, 29 Car. 2, c. 3, observed—"There is no case in which it has been decided upon that statute what is eventually to become of an estate *pur autre vie*, where it has been partially devised. It appears to me, that it belongs to the representative of the devisor. The statute of frauds directs, that an estate *pur autre vie* shall be devisable. But where there is a devise which may or must leave a chasm before the estate determines, the residue is not devised. This brings it within the next provision of the statute, 'if no such devise thereof be made,' which provision ought to attach upon the portion of the estate not devised, in order that that portion may be chargeable as assets in the hands either of the heir or of the executor, thereby giving effect to the object of the act. As 'the executors or administrators of the party that had the estate thereof by virtue of the grant,' must mean the personal representative of the devisor; so, when the statute makes the estate chargeable in the hands of *the heir*, such heir must be the heir of the devisor." And the learned Judge then proceeded to argue, that this view of the case was supported by the statute 14 Geo. 2, c. 20, s. 9, which enacts, that estates

Whether estate *pur autre vie* passes without words of limitation.

ABSOLUTE INTEREST IN LEASEHOLDS.

pur autre vie, in case there were no special occupant, not devised according to the statute of frauds, or so much thereof as should not have been so devised, should be applied and distributed as personal estate of the testator.

Remarks on *Doe* v. *Robinson.*

If this decision is to be considered as establishing that words of limitation, or some equivalent expressions, are necessary to pass an estate *pur auter vie* in a will, the same rule must obtain in regard to deeds; for it would be doing violence to every sound principle of construction to apply a stricter rule to the former than to the latter, and it must apply no less to deeds creating than to deeds transferring such estates; and the consequence would be, that, if lands were demised to A. (without words of limitation) during the lives of C. and D., the estate of A. would cease at his death, though the *cestuis que vie* were living, which would have the effect of reducing to a dead letter the enactments (29 Car. 2, c. 3, s. 9, and the 14 Geo. 3, c. 20) disposing of property of this description belonging to a deceased owner, *of which there is no special occupant.* Nor is this the only incongruity to which the doctrine in question would lead; for, suppose a testator, who is possessed of a lease *pur auter vie*, of which there is no special occupant, to bequeath such leaseholds to A., and the residue of his personalty to B., the ulterior interest in the leasehold property, not included in the specific bequest, would, (as is admitted by Mr. Justice *Bayley* in *Doe* v. *Robinson*,) be distributable under the statute of 14 Geo. 2, c. 20, as part of the personal estate; in other words, would belong to the residuary legatee, *though the gift to such legatee was expressed in the same terms as the specific gift, which was held to be inoperative to pass it.*

INTESTACY.

XIX.—DESTINATION OF THE REAL AND PERSONAL ESTATE OF PERSONS DYING INTESTATE.

Expediency of an acquaintance with the effect of intestacy.

As the statutes of distribution supply a standard or test for ascertaining the objects of some of the gifts treated of in a preceding section; (*ante*, p. 197); and as every testator ought to be acquainted with the nature of that scheme of distribution which his own act will supersede, the rules that regulate the transmission of real and personal estate, on the decease of the intestate owner, seem to form a fit subject for consideration here, especially since it will afford an opportunity of bringing before the reader the late statutory alteration in the law of inheritance. The main characteristics of that law, namely, the preference of males to females, and among males of the elder to the younger, and the co-heriting of females in equal degree, which are too well known for detailed explanation, have been left untouched by the late enactment, whose chief (but not sole) object ap-

Law of inheritance.

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pears to have been the abrogation of the rules which excluded the lineal ancestors of the intestate and the relations of the half blood,—doctrines of feudal origin, and ill suited to the present state of society.

Gavelkind and Borough-English.

It ought to be observed that the law of primogeniture is not of universal prevalence throughout England, for other modes of descent obtain, by special custom, in some places. The descent of copyhold lands is invariably regulated by the custom of the manor; and even in regard to freeholds, the general rule of descent admits of some considerable exceptions: for instance, lands held by the tenure of gavelkind (which prevails principally in Kent) descend to all the sons in equal degree, and not exclusively to the eldest, corresponding with the course of descent by the general law among females; (see 2 Black. Com. 84); and burgage tenements, held by the tenure of Borough-English, which go to the youngest son. See *Lutwyche* v. *Lutwyche*, Forr. 976. Between the two customs there is this material difference: gavelkind extends to brothers; (Rob. Gav. 92); Borough-English does not. Hence, if a person seised of lands held by the tenure of Borough-English dies without issue, leaving brothers, the eldest, according to the general law, and not the youngest as by the custom, will inherit. See 1 Durn. & East, 466; Watk. Desc. 113.

Stat. 3 & 4 W. 4, c. 106.

We now proceed to the late important act of 3 & 4 W. 4, c. 106, which is intituled "An Act for the Amendment of the Law of Inheritance." Sect. 1 enacts, "That except where the nature of the provision or the context of the act shall exclude such construction, the word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or Borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words 'the purchaser' shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word 'descent' shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression 'descendants' of any

Meaning of words in the act.

"Land."

"The purchaser."

"Descent."

"Descendants."

ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression 'the person last entitled to land' shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word 'assurance' shall mean any deed or instrument (other than a will) by which any lands shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Person last entitled."

"Assurance."

Number and gender.

Sect. 2. "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

Sect. 3. "That when any land shall have been devised, by any testator who shall die after the 31st day of December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

Sect. 4. "That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said 31st day of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December, 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

Sect. 5. "That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Brothers, &c. shall trace descent through their parent.

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Lineal ancestor may be heir in preference to collateral persons claiming through him.

Sect. 6. "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

The paternal and the male lines to be respectively preferred.

Sect. 7. "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

Sect. 8. "That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

Sect. 9. "That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

After the death of a person attainted, his descendants may inherit.

Sect. 10. "That when the person from whom the descent of any land is to be traced shall have had any relation, who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1834.

Act not to ex-

Sect. 11. "That this act shall not extend to any descent which shall take

place on the death of any person who shall die before the said 1st day of January, 1834.

tend to any descent before Jan. 1834.

Sect. 12. "That where any assurance executed before the said 1st day of January, 1834, or the will of any person who shall die before the same 1st day of January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st day of January, 1834."

Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

The distribution of the personal estate of intestates is, with some local exceptions presently noticed, regulated by the stat. 22 & 23 Car. 2, c. 10, which disposes of the surplus, after paying debts and funeral expenses, as follows: viz. one-third to the wife and two-thirds to the children, equally, or, such children being dead, to such persons as legally represent them, "other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allowed to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate." And in case there shall be no child nor any legal representatives of any child, then one moiety to the wife, and the residue equally to the next of kindred in equal degree, and those who legally represent them; but no representations to be admitted among collaterals after brothers' and sisters' children. If no wife, then all the estate equally amongst the children; and if no child, then to the next of kindred in equal degree, and their legal representatives as aforesaid. The statute also provides, that no distribution shall be made till the expiration of a year, and that persons to whom it shall be made shall give bond with sufficient sureties to refund if any debts owing by the intestate should thereafter be recovered. The act not to prejudice the customs of London and York.

Statutes 22 & 23 Car. 2, c. 10.

Distribution of personal estate.

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Claim of surviving husband.

This statute, it will be observed, does not recognise the title of a surviving husband, on whom, therefore, it might seem to impose the obligation of distributing the personal estate of his deceased wife, not reduced into possession in her lifetime, amongst her next of kin. This led to the passing of the act of 29 Car. 2, c. 3, s. 35, which enacted that the previous statute should not extend to the estates of *feme coverts* dying intestate, but that the husband might have administration as before.

Mother may claim with brothers and sisters.

Doubt seems also to have existed in regard to the relative claims of brothers or sisters, and the mother, being a widow; to remove which, the stat. 1 Jac. 2, c. 17, provided, that if, after the death of the father, any of the children died intestate, without wife or children, in the lifetime of the mother, every brother and sister, and their representatives, should have an equal share with her. This statute is obviously defective in expression, there being no provision for the case of both a wife and mother surviving; but the defect has been supplied by decision; for, where an intestate left a wife and mother, and several nephews and nieces, the children of a deceased brother, his personalty was held to be divisible into fourths, of which two belonged to the widow, one to the mother, and one to the nephews and nieces. *Stanley* v. *Stanley*, 1 Atk. 455; *Keylway* v. *Keylway*, 2 P. W. 344. The word "representatives" in this statute (*i. e.* stat. 1 Jac. 2, c. 17) receives the same construction as the word occurring in the previous general act, which restricts representation among collaterals (but among them *only*) to the children of brothers and sisters; *Pett's case*, 1 P. W. 26; and hence a surviving mother is entitled in exclusion of the *grandchild* of a deceased brother. See *Stanley* v. *Stanley*, 1 Atk. 457.

Mother-in-law.

Of course, a mother-*in-law* is not entitled to the maternal share; she is to all intents and purposes a stranger. See *Duke of Rutland* v. *Duchess of Rutland*, 2 P. W. 216.

Posthumous children not excluded.

Distributive shares, under the act of 22 & 23 Car. 2, c. 10, vest immediately on the intestate's decease, but not so as to exclude an infant *en ventre sa mere*. *Edwards* v. *Freeman*, 2 P. W. 440; *Wallis* v. *Hodson*, 2 Atk. 113.

Right of representation.

The restriction of the right of representation among *collaterals* to brothers' and sisters' children, of course, has the effect of entitling the child of a deceased brother in exclusion of the grandchild of another deceased brother; or, in other words, a living nephew is preferred to the child of a deceased nephew; *Pett's case*, 1 P. W. 26; and, upon similar grounds, the child of a deceased uncle is denied participation with a living uncle. *Maw* v. *Harding*, Pre. Ch. 28.

Distribution, when made *per stirpes*.

Wherever any person claims under the representative clause in the statute, the distribution is necessarily *per stirpes*. Thus, if the intestate, a widower, happen to have left a child and two grandchildren, the children

of a deceased child, his personal property becomes divisible into moieties, of which one goes to the surviving child, and the other to the two grandchildren. But if all the claimants are of equal degree, whatever that degree be, the distribution is *per capita;* for instance, if the only descendants are three grandchildren, the issue of two deceased children, or if the next of kin consist of three nephews, the children of a deceased brother and sister, the distribution will not be (as before) in moieties, but each grandchild or each nephew (as the case may be) will take one-third. *Davers* v. *Dewes,* 3 P. W. 41; *Lloyd* v. *Tench,* 2 Ves. sen. 213.

—when *per capita.*

The statute has been decided to include indifferently the relations of the whole and those of the half blood. *Smith* v. *Tracy,* 2 Vent. 317; *Burnet* v. *Mann,* 1 Ves. sen. 156.

Relations of half blood.

At the present day, very few questions arise concerning relative proximity of kindred, the computation of its degrees being regulated by principles which have been long settled, though this certainty was not arrived at until many adjudications had taken place on disputed points.

In the case of *Mentney* v. *Petty,* Pre. Ch. 593, the Master of the Rolls observed, that the rule was taken from the civil law, and not from the canon law, between which there was a wide difference in the computation of the degrees of proximity; for the *canon law,* prohibiting marriage between relations till after the fourth degree, that they might exclude as many as possible from the liberty of marriage within those degrees, without a dispensation, reckon all in the direct ascending or descending line, and those in the collateral line corresponding with them, to be but one degree; as, for instance, father or mother, uncle or aunt, make but one degree; so, grandfather or grandmother, great uncle or great aunt, make but two degrees: but, by the *civil law,* the father or mother make one degree, the grandfather or grandmother two degrees, and the uncle and aunt three degrees; so that the grandfather or grandmother, in the distribution of an intestate's estate, shall be preferred before the uncle or aunt, as being nearer of kin, within the rules of computation or the law of proximity, by the civil law; and so it was decreed by my Lord Chancellor *Cowper,* in the case of *Duppa,* for the grandmother, against the uncle or aunt. But, if you go one degree further, and reckon to the great grandfather or grandmother, they are in equal degree with the uncle or aunt, as they are in the third degree in direct lines with the uncle or aunt, who are in the third degree in the collateral line; for you must reckon through the grandfather or grandmother to come to the uncle or aunt, and then they are in just the same degree of remove from the nephew or niece in the collateral line, as the great grandfather or great grandmother are in the direct ascending line, and consequently, being in equal degree of kindred by the rules of computation of the civil law, are equally entitled to the distributive shares with the uncle or aunt. See

Mode of computing degrees of consanguinity.

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also *Woodroff* v. *Wickworth*, Pre. Ch. 527; *Blackborough* v. *Davis*, 1 P. W. 41.

Points decided respecting consanguinity.

Applying the principle just stated, it will be obvious that uncles and aunts are on an equal footing with nephews and nieces. *Durant* v. *Prestwood*, 1 Atk. 454; *Lloyd* v. *Tench*, 2 Ves. sen. 213. The like equality, of course, prevails among their respective children, *i. e.* first cousins and great nephews and nieces; *Thomas* v. *Ketteriche*, 1 Ves. sen. 333; who consequently are postponed to uncles and aunts, nephews and nieces. *Maw* v. *Harding*, Pre. Ch. 28; *Bowers* v. *Littlewood*, 1 P. W. 594. Some difficulty was felt in adjusting the relative claims of the grandfather or grandmother, and of the brother or sister: the former clearly was in the second degree; and it was contended with some plausibility, that, as the latter could only be reached through the father and mother, he was at an equal distance, in point of consanguinity, from the intestate. It was decided, however, that, having regard to the doctrine of the civil law, and the rules in force before the statute, the brothers and sisters were entitled in preference to the grandfather and grandmother. *Evelyn* v. *Evelyn*, Amb. 191.

Inconveniences of intestacy.

But though there is now little room for disputation, in regard to the proximity of relationship, yet the disposition of property which the statute makes, however fair and equitable in the main, is too simple to satisfy the various exigencies of family provisions, and would seldom be deliberately adopted. For instance, a man having a wife and children rarely intends to (as the statute would) give to the wife a distributive share in the capital, but more commonly means to restrict her to a life interest; and the shares of children who are minors, or who are or may become married women, require modifications adapted to infancy and coverture. And even where it is not intended materially to vary the destination of the property, testacy is generally to be preferred to intestacy. Some of the grounds of this preference are, that a testator is enabled to place the legal control over the property in the hands of his own nominee, with regulated powers, instead of its being intrusted to the person or persons who may happen to obtain administration, and whose authority is for many purposes inconveniently narrow; besides which, when the next of kin are numerous, their equal right to administer sometimes occasions disputes. A will also prevents (or at least ought to prevent) questions among children respecting advancements (presently noticed). Nor is this all: to obtain probate of a will is a simpler proceeding than to take out letters of administration (though certainly the difference is slight), the duty is rather lower (*a*), and, what is more important, the

Difference in rate of duty on

(*a*) The difference between the duty imposed on probates of wills and letters of administration operates as a tax on intestacy. The reason for

intention in favour of presumed next of kin is less exposed to hazard by making an express gift to them, than by confiding their interests to the law of succession. For example: suppose a man to have an only brother, whom he presumes to be his next of kin, and that, intending his brother to succeed to his property, he dies intestate; the claim of such brother might have to compete with the adverse pretensions of another relation of the same degree, whom the deceased had never known or recognised as such, or who was supposed to be dead; or it might even turn out, that, in consequence of an irregularity in the marriage of the parents of the deceased, and of his reputed brother, no legal relationship subsisted between them; in which case the title of the latter would be wholly supplanted by that of the crown. In such cases administration is granted to the patentee of the crown. *Jones* v. *Goodchild*, 3 P. W. 33. INTESTACY.

The hotchpot clause in the statute of 22 & 23 Car. 2, c. 10, has given rise to many questions. It has been held not to apply to the case of an advancement by a widow, its language being exclusively applicable to the Hotchpot clause in stat. 22 & 23 Car. 2, c. 10.

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this difference is not obvious. Probably it was considered that, as the rate of duty on legacies and distributive shares diminishes in proportion to proximity of relationship, and as the statutes of distribution give the property to the *nearest* relation, an administration is, in this point of view, generally less productive to the revenue; but this is far more than counterbalanced by the consideration that the law, under an intestacy, divides the personal property in absolute shares among the next of kin, on whose decease respectively those shares, if still their property, become again taxable; while, on the other hand, a will, by suspending the absolute ownership (as it frequently does) during the enjoyment of several successive takers, shifts the property to new hands without subjecting it to any fresh impost. The difference thus occasioned is much greater than is commonly imagined. For instance, suppose a widower, with six children, to die intestate, and five of such children afterwards to die infants, unmarried and intestate; the absolute sixth share of each child in his father's personal estate, would, of course, in the first instance, be liable to duty; and, on the respective deceases of the five dying children, their shares (and, as to all subsequent to the first, their *derivative* as well as original shares) would again become subject to the operation of both the administration and distributive share duties, constituting an aggregate far exceeding what attached on the original devolution of the property from the father to the children, and which would have been wholly avoided if he (the father) had left a will bequeathing the shares (in the ordinary way) to the children attaining majority. As a measure of fiscal policy, therefore, the discouragement of intestacy must be pronounced rather short-sighted. wills and administrations.

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male parent; *Holt* v *Frederick*, 2 P. W. 356; though, seeing how intimately this clause is connected with the general enactment, there seems to be much difficulty in supporting such a construction, except upon grounds that would exclude the case of a widow dying intestate from the statute altogether, which clearly would not be listened to.

Points decided respecting advancements, under the stat. 22 & 23 Car. 2, c. 10.

The advancement clause is considered to have been inserted for the mere purpose of producing equality among the children and their representatives, and consequently cannot be made to augment the distributive share of the widow. *Ward* v. *Lant*, Pre. Ch. 182; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

The children of a deceased child, who was advanced by the intestate in his lifetime, are clearly bound to bring into hotchpot what their parent received, in like manner as such parent, if living, must have done. *Proud* v. *Turner*, 2 P. W. 506.

Mere alimony not an advancement.

In order to constitute an advancement, the gift must be by way of portion or preferment to set the child up with. 1 Ves. sen. 17. Hence, a mere allowance by way of maintenance is not sufficient; see 2 P. W. 449; (unless, perhaps, where extended to a daughter after marriage, 3 Atk. 528); nor will small presents of money for wedding clothes, travelling expenses, or other such purposes, be so considered; 3 P. W. 317; 3 Atk. 528; nor even the payment of an apprentice fee, being in the nature of a consideration for maintenance. *Secus*, as to the purchase of any office or promotion, civil or military. See 3 P. W. 317, n.; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

Annuity deemed an advancement.

An annuity settled on a child is an advancement, though given expressly for maintenance; *Hern* v. *Barber*, cit. 1 Ves. sen. 17; and is to be estimated at its value when granted, unless the annuity should happen to have ceased, in which case it seems the child would have an option to bring in the sum actually received. *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51. Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement, and it is not the child's estate for life only that ought to be brought in. *Per Lord Hardwicke*, 2 Atk. 635.

Provision need not be voluntary.

It is not essential to a statutory advancement that it be gratuitous or voluntary; for a portion secured by a marriage settlement has been decided to be such; *Edwards* v. *Freeman*, 2 P. W. 435; nor need it be payable or even vested before the intestate's decease; it is sufficient that the child has *in event* become entitled under a settlement made in the intestate's lifetime. *Edwards* v. *Freeman*, 2 P. W. 435 (*a*).

(*a*) In this case the contingency had happened; otherwise, it seems to have been thought that distribution must have been suspended until it did happen: *sed quære.*

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A legacy, not being a provision "in the lifetime," need not be brought into hotchpot by a child claiming "a share" in the undisposed of residue. 2 Swinb. 165; 2 P. W. 440. Indeed, the doctrine is confined to cases of intestacy; for if, by the will, an executor is appointed, which is at law (though now at law only (*a*),) a disposition of the entire personal estate, it seems that the hotchpot clause of the statute would be excluded. And therefore, where A. made a will, appointing an executor, and bequeathing certain legacies, but not the residue, which was held to be distributable under the statute, a daughter of the deceased, who had received a marriage portion, was held to be entitled to her full share of such residue. *Vachell* v. *Jeffereys*, Pre. Ch. 170; see also *Cowper* v. *Scott*, 3 P. W. 125. The mere appointment of an executor would produce the same excluding effect, even though *no* part of the personalty were *beneficially* disposed of. *Walton* v. *Walton*, 14 Ves. 324. Lord *Hardwicke* appears to have ruled, that an advanced child might claim a share in that portion of the personal estate which, by the customs of London and York, is distributable according to the statute of distributions, without bringing the advancement into hotchpot. *Hearn* v. *Barber*, 3 Atk. 214.

Rule where intestacy is partial.

Advancement where intestacy is partial.

Real estate descending to the eldest son is, by the express terms of the statute, not to be deemed part of his distributive share; and this has been held to extend to any other child whom custom makes heir. *Lutwyche* v. *Lutwyche*, Forr. 276. Monies expended by the father in the improvement or repair of houses which he afterwards suffers to descend, are of course undistinguishable from any other descended realty. *Smith* v. *Smith*, 5 Ves. 721.

What provision for the heir deemed an advancement.

It is conceived that a settlement of *real estate* on the eldest son *by deed*, would not be an advancement within the meaning of the statute, of which the terms are "by descent *or otherwise*." See 5 Ves. 723. However, *personalty* settled on the heir clearly must be brought into hotchpot by him; *Phiney* v. *Phiney*, 2 Vern. 638; see 8 Ves. 55; but money which is absolutely to be laid out in land would be regarded, it seems, as a settlement of land. *Vide Hume* v. *Edwards*, 3 Atk. 453.

The statute of distributions expressly saves the customs of the city of London and the province of York, the operation of which, extending as they do over two large and opulent districts, ought not to be passed over without some, though it must be a partial, notice. These customs do not now interfere with the testamentary power of disposition over the entire property, by the exercise of which they may be wholly excluded; (*vide* stat. 4 & 5 W. & M. c. 2; 2 & 3 Ann. c. 5; 11 Geo. 1, c. 18); and they only apply in the case of total intestacy; for where one-seventh share of the personal estate of a freeman of London lapsed by the lega-

Distribution under the customs of London and York.

(*a*) *Vide* stat. 1 Will. 4, c. 40, stated *ante*, Vol. 6, p. 319.

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tee's decease in the testator's lifetime, it was held to be distributable under the statute; *Cowper* v. *Scott*, 3 P. W. 119; and in a recent case the mere appointment of an executor was held to exclude the custom of York. *Fitzgerald* v. *Field*, 1 Russ. 425. The custom of London extends to the personal property, wherever situate, of freemen, (as well honorary as others, *Onslow* v. *Onslow*, 1 Simons, 18), dying in London or elsewhere; that of York, to any inhabitant or householder within the province dying there or elsewhere. Under both customs the personalty of the intestate, after payment of debts and allowing to the widow her "chamber," (which appears to comprise wearing apparel and furniture for her bedchamber, (2 Atk. 636),) is distributed as follows:—if the intestate left a widow and child or children, the widow takes one-third by the custom, the child or children, another third, and the remaining one-third (called the dead man's part, because formerly distributable by the ordinary *ad pios usus*,) is distributed according to the statute of distributions, which, it will be remembered, gives one-third to the widow, and the remaining two-thirds to the child or children; hence, the result is, that, by the combined effect of the custom and the statute, the widow takes four-ninths and the children five-ninths. If there is a widow and no child, the widow takes one moiety by the custom and half of the remaining moiety by the statute, making three-fourths of the whole. If the intestate left a child or children and no widow, the child or children would take the entire personalty, one moiety by the custom and the other by the statute. *Vide* 3 Atk. 527. If he has neither wife nor child, the custom is wholly excluded, as it does not extend to grandchildren. 1 Vern. 367; 2 Salk. 426. There are two material points of difference between the respective customs of London and York; one is, that, in London, the children cannot dispose of their orphanage part until the age of twenty-one; 2 Vern. 558; and if they die under that age, whether *sole* or married, their shares survive to the other children. Pre. Ch. 537. The other difference is, that in York the heir at common law, who inherits *any* land, either in fee simple or fee tail, however inconsiderable in value, is excluded from any filial part under the custom. Swinb. 231.

Points respecting advancements under the customs.

Though, for many purposes, advancements under the customs and under the statutes of distribution (*ante*, p. 221) are subject to the same rules, (3 Atk. 528), yet there are some distinctions between them. For instance, the custom of London requires that the advancement should be of personalty and upon marriage. *Hume* v. *Edwards*, 3 Atk. 452. According to some authorities the marriage of a freeman's child against his consent, unless he is afterwards reconciled, forms a ground of exclusion; see *Hume* v. *Edwards*, 3 Atk. 451; see also 1 Vern. 354; but this is elsewhere denied. *Hill* v. *Blacket*, Cas. Temp. Finch, 248; 2 Bac. Ab. Gwill. ed. 252. A freeman's child will, it seems, be wholly excluded by an advancement, of which the amount is uncertain; (see 3 Atk. 527,

lso 452); and the certainty must appear by some writing signed by the father. *Chace* v. *Box*, 1 Eq. Ca. Ab. 155.

Wife's customary share barred by settlement.

It may be observed, that, where the widow is barred by settlement of her customary share, the same distribution takes place which would have been made if the deceased had left no wife. *Rawlinson* v. *Rawlinson*, cit. 2 Atk. 644. But the points respecting the bar by settlement are of little importance, now that the husband has the power of excluding the custom by his will, which has put an end to the necessity, and occasioned the disuse of ante-nuptial stipulations thereon. It is observable, that the principle of the statutes which threw open to the testamentary disposition of the owner personalty distributable under the customs in question, is precisely similar to that of the recent enactment respecting dower. *Vide post*, p. 244. For other points respecting the customs, *vide* the Digests and books treating of the customs of London.

IN FAVOUR OF WIDOW.

WILL, *giving entire* REAL *and* PERSONAL ESTATE *to the* TESTATOR'S WIDOW.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE, DEVISE, and BEQUEATH all my real and personal estate, whatsoever and wheresoever, unto my affectionate wife [*name*]; To hold the same unto her my said wife, her heirs, executors, administrators, and assigns, according to the nature thereof respectively, for her own absolute use and benefit. And I appoint my said wife sole executrix of this my will. IN WITNESS whereof I have hereunto set my hand and seal, this —— day of ——, 1834.

Signed, sealed(*a*), published, and declared by the said [*testator*] the testator, as and to be his last will and testament, in the presence of us, who in his presence have hereunto subscribed our names as witnesses.

[Three witnesses, *who should be persons not deriving any beneficial interest under the will. Vide ante*, p. 78.]

(*a*) A seal is not necessary.

IN FAVOUR OF AN ONLY CHILD.

WILL *of* REAL *and* PERSONAL ESTATE, *in favour of an* ONLY CHILD (*a*).

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE AND DEVISE all my

Remark on the precedent in the text.

(*a*) This and the preceding form are alike applicable to dispositions in favour of the testator's wife or child, or any other single individual. They both exemplify the exercise of the testamentary power under the simplest

IN FAVOUR OF AN ONLY CHILD.

freehold and copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, to the uses following, namely, *To such uses*, for such estate and estates, and upon and for such trusts, intents, and purposes, and charged and chargeable in such manner and form, as my son, [*name*], shall at any time or times, or from time to time, by any deed or deeds, to be attested or not attested, direct or appoint; and in default of such direction or appointment, and subject to any such which shall not be a complete disposition of the fee simple and inheritance of the said premises, *To the use* of my said son, his heirs or assigns for ever. AND I GIVE AND DEVISE all the real estate which is now vested in me as trustee or mortgagee to the same or the like uses as I have expressed and declared concerning the hereditaments hereinbefore devised, subject, nevertheless, to the trusts and equities affecting the same respectively. I ALSO GIVE AND BEQUEATH to my said son all the personal estate and effects of or in which I shall be possessed, or in any manner

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circumstances. The present form possesses advantages which would in general entitle it to preference; by vesting in the devisee a power of appointment, it enables him to dispose of the freehold lands by a single deed, and also discharged from judgment-debts; (*vide ante*, Vol. 7, p. 382); and, with respect to copyholds, might have the further effect of avoiding an admission-fine; for, as the donee's appointee or nominee would be in immediately under the will, he would be entitled to claim admittance without the necessity of the previous admission of the donee himself, which would only become necessary in case of his retaining the property as devisee, or in case of the sale and admission of the purchaser not being effected with sufficient celerity to prevent the lord's seizure. *Vide ante*, Vol. 8, p. 60. Hence, even if dower had ceased to exist, there would be sufficient reason for continuing to introduce powers of appointment in wills as well as conveyances of freehold estates; but, in fact, the exclusion of dower is still an object not to be lost sight of, for the modifications of this right, made by the act of 3 & 4 Will. 4, c. 105, apply only to widows who were married subsequently to the 1st of January, 1834; so that if a testator even now devises his freehold lands to A. in fee, and it happens that A. has a wife, to whom he was married in 1833, or any preceding year, he could not make a title to the inheritance exclusively of the dower, without the concurrence of his wife; though there is this important difference, that now, under the act of 3 & 4 Will. 4, c. 74, the concurrence of the wife might be given without a fine.

IN FAVOUR OF AN ONLY CHILD.

interested at the time of my decease, to and for her or his own absolute use and benefit. And I appoint my said son sole executor of this my will, and revoke all other wills by me at any time heretofore made. In witness whereof I have to this my will set my hand this —— day of ——, 1834.

FOR CHILDREN ABSOLUTELY.

WILL, *disposing of* Personal Estate *in* Favour *of* Children, *in* Equal Absolute Shares (*a*).

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I give and bequeath all the monies, securities for money, and other the personal estate of which I shall be possessed at the time of my decease, unto all and every my child and children who shall survive me, if more than one, in equal shares and proportions, to and for his, her, or their own absolute use and benefit. I give and devise unto my two sons, [A.] and [B.], the real estate now vested in me as trustee or mortgagee, subject, nevertheless, to the trusts and equities respectively affecting the same (*b*). And I appoint my said two sons, [A.] and [B.], executors in

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(*a*) This precedent supposes the children to be all adult, and contains no restrictions adapted to the actual or possible coverture of any. In such a case it seems unnecessary to clothe the trustees with any extraordinary powers, the beneficial legatees being competent to sanction or concur in any of their proceedings.

Remark on the devise of trust and mortgage estates.

(*b*) The term "securities for money occurring in the residuary clause," would, according to recent decisions, carry the legal estate in mortgages; *Mather* v. *Thomas*, 10 Bing. 44; but it is in general better to insert an express devise of estates held in trust and mortgage, than to rely on any such rule of construction, especially where, as in the present case, the residuary gift is in favour of children generally, who, even if all adult, might be too numerous to be conveniently made parties to the re-conveyances and transfers of mortgages; and, being tenants in common, there would be also the danger of the legal estate, in some of the aliquot shares, devolving, by the event of death, to infants, which is effectually guarded

trust of this my will. And I revoke all former wills by me at any time heretofore made. IN WITNESS, &c. (*Three witnesses.*) FOR CHILDREN ABSOLUTELY.

WILL, *disposing of* RESIDUARY PERSONAL ESTATE *(after bequeathing an Annuity and other Legacies, including Pecuniary Legacies to Charitable Institutions), for the benefit of the Testator's* WIFE *for* LIFE, *with an ulterior Bequest to his* CHILDREN, *in equal Shares. Usual Provisions for* MAINTENANCE *and* ADVANCEMENT *during* INFANCY. CLAUSES *subjecting* DAUGHTERS' *Shares to Trusts for their* SEPARATE *and* INALIENABLE *Use during Coverture, with ulterior Trusts in favour of their* CHILDREN, *if any, and, on Failure of Children, according to the absolute* APPOINTMENT *of the* DAUGHTERS *and, in Default of Appointment, for their respective* NEXT *of* KIN. DOWER CLAUSE. *Usual* POWERS *to Trustees, to* PAY DEMANDS, COMPOUND DEBTS, *&c. Clauses authorizing and providing against* DELAY *in the* EXECUTION *of the Trust to* CONVERT *the Property.* POWER *to* APPOINT *new* TRUSTEES, *with some other ordinary Clauses.* PERSONALTY IN FAVOUR OF WIFE AND CHILDREN.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE unto my affectionate wife, A. B., all the household goods, plate, linen, china, glass, printed books, trinkets, fuel, wines, liquors, and housekeeping provisions, which shall be in and about my dwelling-house at the time of my decease. I ALSO GIVE unto my said wife the sum of Furniture, &c. to wife.

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against by making the co-devisees joint tenants, among whom the estate would survive.

This consideration suggests the advantage of vesting trust and mortgage estates in several persons, rather than in a single individual. It is usual and convenient to devise the legal estate in mortgages to the persons who, as executors, will be authorized to receive the monies.

PERSONALTY IN FAVOUR OF WIFE AND CHILDREN.

100*l.* to supply her immediate occasions, and which I direct shall be paid to her within fourteen days after my decease (*a*).

Legacies to charities.

I GIVE unto the British and Foreign Bible Society the sum of 100*l.*, and to the Infirmary at ——, in the county of ——, my native town, the sum of 50*l.*, and I direct that the said legacies respectively shall be paid to the treasurers for the time being of the said several institutions, to be applied to the general purposes thereof respectively. And I direct that the said two last-mentioned legacies shall be paid out of such parts of my personal estate as may legally be devoted to charitable purposes (*b*), and shall be paid in preference to all other pecuniary legacies bequeathed by this my will.

Annuity to mother.

I GIVE unto my dear mother [*name*], an annuity or clear yearly sum of 80*l.* during her life, free from legacy duty (*c*). And I direct my executors to invest or appropriate so much Three Pounds *per centum* Consolidated Annuities as shall be sufficient to yield the annual sum of 80*l.*, as and for a fund for the payment of the said annuity; and I direct, that, until such investment or appropriation, the said annuity shall be paid out of my personal estate in equal half-yearly portions, the first payment thereof to be made on such one of the half-yearly days for the payment of dividends arising from the Three Pounds *per centum* Consolidated Annuities, as shall occur next after my decease. And I direct, that, at the decease of my said mother, the stocks, funds, and securities constituting the fund for the payment of the said annuity, shall sink into my residuary personal estate.

Pecuniary legacies to children.

I GIVE unto each of my children the sum of 1000*l.*; and direct that the legacies of such of my children as, at the time of my decease, shall have attained the age of twenty-one years, or shall have been mar-

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(*a*) As six months may elapse before the widow becomes entitled to the receipt of any portion of her income under the residuary bequest for life, an immediate pecuniary legacy is in general a proper concomitant of such a residuary gift.

(*b*) *Vide* stat. 9 Geo. 2, c. 36, *ante*, p. 27.

(*c*) Annuities should generally be given free from legacy duty, because the legatees, having no capital out of which it is payable, the impost is necessarily thrown on the income, which it diminishes during the first four years from its commencement—possibly the whole period of its continuance. *Vide ante*, Vol. 8, p. 375.

ried, shall be paid to them respectively within six calendar months after my decease; and that the legacies of such of my children as shall, at the time of my decease, be under the age of twenty-one years and unmarried, shall be invested by the trustees or trustee for the time being of this my will, in their or his own names or name, in government or real securities, and the dividends or interest thereof from time to time applied by such trustees or trustee for the maintenance and education of such last-mentioned child or children respectively, during his, her, or their minority or respective minorities, or until he, she, or they shall marry; and the capital or principal of such legacy or respective legacies shall be paid or transferred to him, her, or them respectively, when and as such child or children respectively shall attain the age of twenty-one years, or marry. AND I FURTHER DIRECT AND DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at their or his own discretion, during the minority or respective minorities, or before the marriage of any or either of my said children, to apply any part, not exceeding one half of the principal or capital of the said legacies respectively hereinbefore bequeathed to my said children, or any or either of them, in or towards his, her, or their advancement or preferment in the world, or otherwise for the benefit of such child or children respectively, in such manner as my said trustees or trustee shall think proper. And in case any of my said children shall depart this life under the age of twenty-one years, and without having been married, then I direct that the legacy or legacies hereinbefore bequeathed to such child or children respectively, (subject, nevertheless, to any advancement or advancements which shall or may have been made thereout as aforesaid), shall sink into and constitute a part of my residuary personal estate. I GIVE unto my friends [*executors*], the sum of 50*l.* each, as a mark of my esteem, and in consideration of the trouble they will have in executing the trusts of this my will (*a*). I GIVE unto my servants [*servants*], if

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Power of advancing part of pecuniary legacies.

(*a*) It is always better to shew explicitly, as here, whether legacies to trustees are or are not to be regarded as given to them as a compensation for their trouble, in order to exclude questions respecting their claim in

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they shall be in my service at the time of my decease, the sum of 10*l.* each. AND I GIVE AND BEQUEATH unto the said [*executors*], all my ready money, securities for money, goods, chattels, credits, and personal estate and effects, whatsoever and wheresoever, and of whatsoever nature or kind soever, not hereinbefore specifically bequeathed; and also all the personal estate over which I have a disposing power; To hold the same unto the said [*executors*], their executors or administrators, upon the trusts following, (namely): *Upon trust*, as soon as conveniently may be after my decease, in the discretion and of the absolute authority of the trustees or trustee for the time being of this my will, to sell and dispose of, collect, get in, and convert into money so much and such parts of the same residuary personal estate as shall not consist of money, or securities for or investments of money, yielding income, (other than personal securities, which I intend shall be called in). AND I hereby declare that my said trustees or trustee shall stand possessed of the monies to arise and be produced from my said residuary personal estate as aforesaid, or of which the same shall or may happen to be composed at the time of my decease, *Upon trust*, by, with, or out of the same monies, to pay and satisfy or retain all my just debts, funeral and testamentary expenses, and all expenses incident to the execution of the trusts hereby created, and the pecuniary legacies hereinbefore bequeathed, as and when the same shall become payable; *And upon further trust* to lay out and invest the surplus of the same money, in the names or name of my said trustees or trustee, in or upon the public stocks or funds, or government securities of the United Kingdom, or upon mortgage of freehold, copyhold, or leasehold estates in England or Wales. And I hereby empower the trustees or trustee for the time being of this my will, in the execution

Residuary bequest.

Trust for sale and conversion.

Trust for investment.

Powers to trustees in getting in the assets.

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case they renounce the trusts. The general rule seems to be against their title in such a case, unless the testator has shewn, by positive expression, that the legacy was intended to be independent of the office. 3 B. C. C. 95; 2 Cox, 285; 13 Ves. 417; 1 Sim. & Stu. 237. As an executor may act before probate, however, his death, without having proved the will, does not necessarily defeat his claim to a legacy, though given expressly for his trouble. 4 Ves. 212.

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of the trust hereinbefore contained, to pay and satisfy any claim or demand which shall be made against my estate, upon such evidence as they or he shall deem to be satisfactory; and also, in the absolute discretion of the said trustees or trustee, to delay or forego the enforcement or prosecution of any claim or demand which my said trustees or trustee shall or may have against any person or persons whomsoever, or to compound, or otherwise adjust or settle the same in such manner as my trustees or trustee shall deem to be most beneficial to my estate; and also to refer to arbitration any dispute or difference touching the premises. And I further empower the trustees or trustee of this my will, in their or his discretion, to postpone or delay the sale or conversion of any part or parts of my residuary personal estate hereinbefore directed to be sold and converted; and I direct that, in the mean time, the income arising from the property so remaining unsold or unconverted, shall, from the period of my decease, belong to and be received by the person or persons who would be entitled, under the trusts hereinafter contained, to the dividends, interest, and annual produce of the investment which would or ought to have been made of the monies arising from such sale and conversion, if the same had actually taken place (*a*).

Clauses authorizing the trustees to delay the execution of trust for sale and conversion, and regulating the destination of the income in the mean time.

And I hereby further declare, that all and every person and persons who shall or may pay any sum or sums of money to the trustees or trustee for the time being of this my will, shall be exonerated from all responsibility in respect of the application thereof.

Exoneration to persons paying trust monies.

I give and devise to the said [*executors*], and their heirs, all the real estate now vested in me as trustee, upon trust to carry into effect the trusts and purposes affecting the same. And I also give and devise unto the said [*executors*], and their heirs, all the real estate now vested in me as mortgagee, upon trust to stand

Devise of estates held in trust and mortgage.

(*a*) The doctrine which supplies occasion for a clause of this nature is fully discussed *ante*, Vol. 6, p. 307. In some cases it might be improper to provide that the *cestui que trust* for life should have the actual income of the unconverted property, as where it consists principally of annuities or leaseholds for short terms, or where any considerable portion of the property is reversionary. Clauses adapted to these special circumstances will be found in subsequent precedents.

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seised thereof, subject to the equity of redemption subsisting therein; and, upon the receipt or discharge of the monies secured by any mortgage or mortgages, to execute such assurances of the legal estate of the mortgaged hereditaments as the nature of the case may require. AND I HEREBY DIRECT AND DECLARE, that the trustees or trustee for the time being of this my will, shall stand and be possessed of the stocks, funds, and securities, to be purchased by them under the trusts hereinbefore contained, and which shall or may happen to compose part of my residuary personal estate at the time of my decease, upon the trusts following, (that is to say): UPON TRUST, from time to time, to pay the dividends, interest, and annual produce arising therefrom, unto my said wife, [*name*], or permit or empower her to receive the same during her widowhood; and from and immediately after her decease or marriage again, then as to and concerning the said stocks, funds, and securities, and the dividends, interest, and annual produce thenceforth to arise therefrom, IN TRUST for all and every my child and children who shall be living at the time of my decease, and who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or marry, for the absolute use and benefit of such child and children respectively, if more than one, in equal shares; subject nevertheless, as to the shares of such of my children as shall be daughters, to the trusts hereinafter declared concerning the same. PROVIDED ALWAYS, and I direct and declare, that in case, at the death or marriage again of my said wife, any of my children, being a son or sons, shall not have attained the age of twenty-one years, or, being a daughter or daughters, shall not have attained that age, or been married, then it shall be lawful for the trustees or trustee for the time being of this my will, in their or his discretion, from time to time after the decease or marriage again of my said wife, to apply all or any part of the yearly dividends, interest, or annual produce of the presumptive or expectant share of each such child, being a son, during his minority, or being a daughter, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; and that so much of any of the dividends, interest, or annual produce arising

Declaration of the trusts of the invested funds.

Interest to be paid to the wife during widowhood.

Trust for children's sons on attaining twenty-one; daughters on attaining twenty-one, or marriage.

Provision for maintenance during infancy and discoverture.

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from the presumptive or expectant share of each such child respectively, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof shall be added to the principal of the share whence the same shall have arisen; with power nevertheless for the said trustees or trustee for the time being, if they or he shall deem it expedient so to do, to apply such accumulated fund, or any part of the same, in and for the maintenance and education of the child or children from whose presumptive or expectant share or shares respectively the same may have arisen, during any subsequent period of his, her, or their minority or discoverture, or respective minorities or discovertures, as the case may be. PROVIDED ALSO, and I further declare that it shall be lawful for the said trustees or trustee for the time being, with the consent in writing of my said wife, during her widowhood, and after her decease or marriage again, then in the discretion of such trustees or trustee, to apply any part, not exceeding one half of the principal of the vested or presumptive or expectant share or respective shares of each or any of my children, of and in my residuary personal estate, in or towards the advancement or preferment in the world, or otherwise for the benefit of the child or children to whom such share or respective shares shall actually or presumptively belong (*a*), in such manner as the said trustees or trustee shall think proper. AND I DIRECT AND DECLARE, that the trustees or trustee for the time being of this my will shall stand possessed of the share or respective shares in my residuary personal estate of such of my children as shall be a daughter or daughters, upon the trusts following, (that is to say): UPON TRUST to continue or lay out and invest the share of each such daughter respectively, in the names or name of my said trustees or trustee, in government or real securities, and from time to time to pay the dividends, interest, and annual produce of the said stocks, funds, and securities, unto or permit the same to be received by such daughter of mine as aforesaid, for her se-

Power of advancement.

Declaration of trusts of daughters' shares.

Trust for daughters' separate and inalienable use.

(*a*) As the trustees have a power of advancing a moiety of the pecuniary legacies to the children, perhaps the present power may seem superfluous. It is inserted, however, with a view to those cases in which there are no such legacies.

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parate use, free from the control and debts of any husband with whom she may have intermarried, or might afterwards intermarry; and so that, during any coverture of such daughter, she shall have no power to alien or anticipate the growing payments of the said dividends, interest, and annual produce, or any part thereof; and from and after the decease of such daughter of mine as aforesaid, then, as to as well the said trust monies, stocks, funds, and securities, as the yearly dividends, interest, and produce thenceforth to arise therefrom, IN TRUST for all or any one or more of the children, grandchildren, or other issue of such daughter, (such grandchildren or other issue to be born in her lifetime), for such interest or interests, and in such proportions, and subject to such conditions, restrictions, and limitations over, in favour of any other or others of the said children, grandchildren, or other issue, and with such regulations for maintenance, education, and advancement, and to be paid or transferred at such age or ages, either absolutely or upon such contingencies as such daughter of mine as aforesaid, whether covert or sole, shall at any time, or from time to time, by any deed or deeds, to be executed by her in the presence of and to be attested by one witness or more, and to be made either with or without power of revocation and new appointment, or by her last will and testament, or any codicil or codicils thereto to be respectively signed and published by her, in the presence of and to be attested by two or more witnesses, direct or appoint; and in default of such direction or appointment, and subject to any appointment or appointments which shall not be a complete disposition of the whole of the said trust funds, constituting the share of such daughter of mine as aforesaid, then as to the said stocks, funds, and securities, and the dividends, interest, and annual produce to arise therefrom after the decease of such daughter, IN TRUST for all and every the child and children of such respective daughter of mine, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or marry, if more than one, in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively: And if there shall be no child of my daughter who shall live to acquire a vested interest in

For children and issue as daughter shall appoint.

In default of appointment for children equally.

such daughter's share of my residuary personal estate under the trust hereinbefore contained (*a*), IN TRUST for such person or persons, in such parts, shares, and proportions, and to and for such intents and purposes, and in such manner and form in all respects, as such daughter as aforesaid shall at any time or times, whether covert or sole, by any deed or deeds, to be executed and attested as aforesaid, to be made either with or without power of revocation and new appointment, or by her last will and testament in writing, or any codicil or codicils thereto, to be respectively signed and published by her as aforesaid, direct or appoint; and, in default of such direction or appointment, and subject to any appointment which shall not be a complete disposition of the trust premises, then IN TRUST for the person or persons who would, by virtue of the statutes of distribution, be entitled to the personal estate of my daughter at the time of her decease, if she had died intestate, and without leaving a husband or child, and, if more than one, in the like shares (*b*), and upon, to, or for no other trust, intent, or purpose whatsoever. PROVIDED ALWAYS, and I hereby further declare, that no child or children of any daughter of mine who shall take any share or shares of the said trust monies, stocks, funds, or securities by virtue of any appointment or appointments, to be made by any such daughter under the power hereinbefore contained, shall, without any express declaration to that effect therein, be entitled to any share of the unappointed part of the said trust monies, stocks,

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On failure of children in trust as daughter shall appoint.

In default, for next of kin.

Hotchpot clause.

(*a*) This seems rather more correct than saying—"who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or marry,"—because the latter words do not take in the event of the children of a daughter attaining majority or marriage, and afterwards all dying in the testator's lifetime. The point, however, is only one of verbal accuracy; for there can be no doubt of the gift over taking effect in the event suggested, though the words of the will do not literally embrace it.

(*b*) Sometimes the shares of daughters are made to go over to the other children in the event of their dying without leaving issue; but this seems scarcely fair, as it extends the inequality between them and the sons beyond what is required for the exclusion of marital influence, which constitutes the sole reason for modifying the daughters' shares.

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funds, or securities, unless the said child or children shall bring the share or shares appointed to him or them into distribution with the other child or children, and make an allowance for the same (*a*). PROVIDED ALSO, and I further declare, that, in case at the death of any daughter of mine, any of the children, grandchildren, or other issue of such daughter, who, under the trusts hereinbefore contained, or under any appointment or appointments to be made in his, her, or their favour, by virtue of the power hereinbefore contained, may be entitled to any vested or presumptive share or respective shares of the said trust monies, stocks, funds, or securities, being a male or males, shall not have attained the age of twenty-one years, or, being a female or females, shall not have attained that age or been married, then (subject and without prejudice to any direction or regulation which may be made by any such appointment or appointments as aforesaid) it shall be lawful for the trustees or trustee for the time being of this my will, in their or his discretion, from time to time, after the decease of my daughter as aforesaid, (my wife being then deceased or married), to apply all or any part of the yearly dividends, interest, or annual produce of the vested or presumptive share of each such child, grandchild, or issue, being a male, during his minority, or, being a female, during her minority or discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; and that, subject as aforesaid, so much if any of the dividends, interest, or annual produce

Provision for maintenance with respect to the daughters' children.

(*a*) If the daughters are to have a power of bequeathing a life interest to husbands, the following clause should be added:—

Power to daughters to bequeath to husbands.

"PROVIDED ALSO, and I hereby further declare, that, notwithstanding the trusts hereinbefore contained, it shall be lawful for any and every daughter of mine, who shall die leaving a husband surviving her, by any will or testamentary writing, to be signed and published by such daughter in the presence of and attested by two or more witnesses, to bequeath the dividends, interest, and annual produce arising from her share in the said trust premises, or any part thereof, unto or for the benefit of such husband, for any period not exceeding the term of his natural life."

arising from the share or presumptive share of each such child, grandchild, or issue respectively, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof be added to the principal of the share whence the same shall have arisen, with power nevertheless to any trustees or trustee, if they or he shall deem it expedient so to do, to apply the accumulated fund, or any part thereof, in and towards the maintenance and education of the child or children from whose share, or presumptive share, or respective shares, the same shall have arisen. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, during the life of such my daughter as aforesaid, with her consent in writing, and, after the death of such daughter, then, in the discretion of the said trustees or trustee, to apply any part, not exceeding one-half of the principal or value of the vested or presumptive share of each or any of the children, grandchildren, or issue of such daughter of mine as aforesaid, under or by virtue of the trusts hereinbefore contained, or under or by virtue of any appointment or appointments to be made as aforesaid, (subject nevertheless to any contrary direction or regulation therein contained), in and towards the advancement or preferment in the world, or otherwise for the benefit of the child, grandchild, or issue to whom such share or respective shares shall actually or presumptively belong. PROVIDED ALSO, and I hereby declare, that the provision hereby made for my said wife, shall be taken by her in bar and full satisfaction of all dower, thirds, freebench, either at common law, by custom, or otherwise, to which she may become entitled, in or out of all or any of the freehold, copyhold, and customary hereditaments of which I shall or may have been seised or possessed at any time or times during the coverture between us (*a*). PROVIDED ALSO, and I further declare, that it

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Provision for advancement.

Provision for wife to be in bar of dower.

Power to vary securities.

(*a*) This, it will be observed, is the ordinary clause applicable to dower; indeed, if the testator were married on or prior to the 1st of January, 1834, the dower of his widow would be regulated by the old law; and even if the marriage were subsequent, the clause in the text would not be materially varied in expression, though it would differ considerably in operation; the difference being, that widows not within the late act are merely put to their election, and

Remarks upon the dower-clause.

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shall be lawful for the said trustees or trustee for the time being of this my will, at any time, or from time to time, with

might, in spite of the clause in question, choose to take their dower and renounce the benefits of the will. On the other hand, the recent act, by placing dower under the testamentary dominion of the husband, has invested the clause with an obligatory effect. It will be seen, that, if the provision for the widow is out of real estate liable to dower, she would (supposing the act to apply to her in reference to the period of her marriage) be deprived of dower without any declaration to this effect; if out of personalty only, (as in the present case), or out of real estate not liable to dower, such an excluding declaration now is requisite. But, although, for the reason suggested, clauses of this nature will probably be retained to a considerable extent in wills, they must be wholly disused in settlements, as it will be no less unnecessary for a man about to marry to stipulate for the exclusion of dower, than it now is to contract for the power of excluding his wife from her share in his personal estate under the statutes of distribution. With respect to both, positive contract will be requisite in order to establish the widow's claim, in opposition to her husband's testamentary or other disposition. The act of 3 & 4 W. 4, c. 105, is intituled—"An Act for the Amendment of the Law relating to Dower." It enacts, "That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

Act 3 & 4 W. 4, c. 105.

Meaning of the words in the Act:

"Land."

Number.

Widows to be entitled in certain cases to dower out of equitable estates.

Sect. 2. "That when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in jointenancy), then his widow shall be entitled in equity to dower out of the same land.

Seisin shall not be necessary to give title to dower.

Sect. 3. "That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or ob-

the consent in writing of my said wife during her widowhood, and, after her decease or marriage again, then in the discre- PERSONALTY IN FAVOUR OF WIFE AND CHILDREN.

tained within the period during which such right of entry or action might be enforced.

Sect 4. " That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, or by his will. No dower out of estates disposed of.

Sect. 5. " That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower. Priority to partial estates, charges, and specialty debts.

Sect. 6. " That a widow shall not be entitled to dower out of any land of her husband, when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. Dower may be barred by a declaration in a deed;

Sect. 7. " That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land. — or by a declaration in the husband's will.

Sect. 8. " That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid. Dower shall be subject to restrictions.

Sect. 9. " That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. Devise of real estate to the widow shall bar her dower.

Sect. 10. " That no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will. Bequest of personal estate to the widow shall not bar her dower.

Sect. 11. " Provided always, that nothing in this act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them. Agreement not to bar dower may be enforced.

Sect. 12. " That nothing in this act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. Legacies in bar of dower not excluded from preference.

Sect. 13. " That no widow shall hereafter be entitled to dower *ad ostium ecclesiæ*, or dower *ex assensu patris*. Certain dowers abolished.

Sect. 14. " That this act shall not extend to the dower of any widow Act not to take effect before the

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tion of the said trustees or trustee, to sell and dispose of any stocks, funds, or securities, whereon any of my trust monies for the time being shall or may happen to be invested, and to invest the money to arise from such sale in any other of the stocks or funds, or other government securities of the United Kingdom, or on mortgage of freehold, copyhold, or leasehold estates in England or Wales, and vary or transfer the same as occasion shall require, or as shall be thought fit.

Power to appoint new trustees.

PROVIDED ALSO, and I hereby declare, that, in case the said [*trustees*], or either of them, shall die in my lifetime, or shall renounce (*a*) the execution of the trusts hereby created, or in case the said [*trustees*], or any trustee or trustees to be appointed under this present provision, shall die, or shall be absent from the United Kingdom for the space of six calendar months at one time, or shall otherwise become unwilling or unable to act in the aforesaid trusts, then, and so often as the same shall happen, it shall be lawful for my said wife during her widowhood, and, after her decease or marriage again, for my daughters or daughter for the time being, or such of them as shall be adult, and after the decease of such daughters respectively, or in case they shall be under age, or otherwise incapable of exercising this present power, then for the surviving or continuing trustee, or, if there be no such trustee, then for the retiring or renouncing trustee for the time being, or, if there be no such last-mentioned trustee, then for the executors or administrators of the last deceased trustee, to nominate any fit person or persons to supply the place or places of the trustee or trustees respectively so dying, residing abroad, or becoming unwilling or unable to act as aforesaid. And that immediately after every such appointment, the said trust estates, monies, and effects, stocks, funds, or securities (*b*), shall be conveyed or transferred in such manner

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1st January, 1834.

who shall have been or shall be married on or before the 1st day of January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st day of January, 1834, the effect of defeating or prejudicing any right to dower."

(*a*) *Vide ante*, Vol. 6, p. 488.

(*b*) Add, if so intended—

" including the estates held by me as trustee or mortgagee."

that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or in such new trustee or trustees solely, as the case may require (*a*); and such new trustee or trustees shall have and be capable of exercising all the powers and authorities whatsoever hereinbefore contained, in the same manner to all intents and purposes as if he or they had been appointed a trustee or trustees by this my will (*b*). PROVIDED ALSO, that the trustees for the time being of this my will shall be charged and chargeable with such sums only as they respectively shall actually receive by virtue of the trusts hereby reposed in them, notwithstanding their joining in any receipt or receipts, or doing any other act for the sake of conformity; and that they or any of them shall not be answerable or accountable for involuntary misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto. PROVIDED ALSO, and I hereby lastly declare, that it shall be lawful for the said trustees or trustee for the time being, by and out of the money which shall come to their or his hands by virtue of the trusts aforesaid, to deduct, retain, and reimburse for themselves respectively or himself, and also to allow to each other, all costs, charges, damages and expenses, and fees to counsel for advice, which they or any of them may sustain, disburse, or incur in or about the execution of the aforesaid

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Usual indemnities to trustees.

(*a*) The direction respecting the transfer of the trust property is not an essential part of the power, and may be omitted where brevity is desired.

(*b*) Sometimes it is intended that every trustee, who comes into office under a power of this nature, shall have a legacy equal to that which the testator has bequeathed to the trustees named by himself. In such case, the following clause should be added in this place:—

"And I hereby give and bequeath to each and every of the trustees to be appointed under the power hereinbefore contained, the sum of 50*l*., in consideration of the trouble such trustee or trustees respectively will have in the execution of the trusts of this my will, such legacy or legacies to be paid out of so much of my residuary personal estate as shall at the time of such appointment or appointments respectively remain subject to any of the trusts of this my will."

Legacy to newly appointed trustees.

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trusts, or in relation thereto. AND I HEREBY NOMINATE AND APPOINT the said [*trustees*] executors in trust of this my will, and guardians of such of my children as shall, at the time of my decease, be under the age of twenty-one years and unmarried. IN WITNESS, &c.

Appoinment of executors.

VARIOUS TRUSTS FOR CHILDREN.

WILL *by a Widower whose Children are adult, containing* DEVISE *of Copyhold* ESTATE *in* MORTGAGE, *and various* SPECIFIC, PECUNIARY, *and other* LEGACIES, *including* BEQUESTS *of* LEASEHOLD MESSUAGE, MORTGAGE DEBT *and* STOCK LEGACY; DIRECTION *to* PURCHASE *a* LIFE ANNUITY; RESIDUARY DEVISE *and* BEQUEST *to Trustees for* SALE *and* CONVERSION, *the Produce to be divided into* FOUR SHARES, *of which one is given to the elder* SON ABSOLUTELY, *another in* TRUST *for the younger* SON *for* LIFE, DETERMINABLE *on* BANKRUPTCY, ALIENATION, &c., *and, subject thereto, in trust for his* WIFE *and* CHILDREN; *and the remaining two-fourths are bequeathed upon the usual Trusts for the Testator's two* MARRIED DAUGHTERS *and their* CHILDREN. CONCISE PROVISIONS *for* MAINTENANCE *and* ADVANCEMENT. OTHER USUAL CLAUSES.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I DIRECT that my remains be interred, with as much privacy as possible, in my vault in the parish church of ——. I GIVE to the rector for the time being of the said parish the sum of 10*l.*, to be distributed among the poor thereof in such manner as he shall think proper, such legacy to be paid out of my personal estate, not consisting of real securities or chattels real (*a*). I GIVE to my elder son [*name*] my valuable picture of —— by Rubens, and recommend that at his decease he will give the same to my grandson

Direction respecting funeral.

Bequest to the poor.

Picture to elder son with recommendation.

(*a*) *Vide ante*, p. 27.

VARIOUS TRUSTS FOR CHILDREN.

[*name*]; but I expressly declare that this recommendation shall not be construed to create a trust in favour of such grandchild, or in any manner to abridge or restrict the absolute property of my said son in the said picture (*a*). I GIVE my wearing apparel to my servant [*name*], if he shall be in my service at the time of my decease. I GIVE unto and equally among my children who shall be living at my decease, the household goods, plate, linen, china, glass, printed books, paintings and pictures, (except the said picture by Rubens), of which I shall be possessed at the time of my decease; and if any dispute shall arise respecting the division and appropriation thereof, I direct that the effects lastly hereinbefore bequeathed shall be disposed of as part of my residuary personal estate. I GIVE to my friend [A. B.] the sum of 100*l.*, in grateful recollection of the many friendly and professional services he has rendered me during our long intimacy (*b*). I GIVE to my elder son [*name*] all that my copyhold farm, situate in the parish of ——, in the county of ——, in the occupation of [*tenant*], now in mortgage to [*mortgagee*], of &c., for securing the sum of 1600*l.* and interest, to hold the same unto and to the use of the said [*elder son*], his heirs and assigns for ever, he or they paying and discharging the said mortgage debt of 1600*l.*, which I intend shall be borne by the said estate exclusively of my other property (*c*); but

Gift of household furniture, &c.

Devise of estate in mortgage.

(*a*) The frequent agitation of the question whether words of recommendation or request create a trust, strongly suggests the propriety of avoiding it by an explicit declaration to this effect. The doctrine will be discussed in a future note.

(*b*) This gentleman is one of the executors. The reason here assigned for the legacy would entitle him to receive it whether he proved the will or not.

(*c*) Without a provision to this effect, the devisee of a mortgaged estate is entitled to have it disincumbered out of the general personal estate; and a gift of the land "subject to the mortgage" is not considered to indicate an intention that the devisee shall take the land *cum onere*, the words referring to the mortgage being merely part of the description of the property. *Serle* v. *St. Eloy*, 2 P. W. 386, and other cases cit. 2 Jarm. Pow. Dev. 671. Inquiry should always be made by persons taking instructions for wills, whether the testator's real estate (including in this word chattels real,) is subject to any mortgages, and if so, by whom they are to be borne, as there can be no doubt that the rule which throws the burden on the general personal estate very often defeats the intention.

As to devise of estate in mortgage.

VARIOUS TRUSTS FOR CHILDREN.

Bequest of bond debt owing from son-in-law to obligor's wife.

Bequest of leasehold messuage in trust.

Bequest of mortgage debt.

any arrear of interest which shall be owing thereon at the time of my decease shall be paid out of my general personal estate. I GIVE to my daughter [*name*], wife of [*husband*], of &c., the sum of 500*l.*, now owing to me upon the bond of the said [*husband*], and all interest which may happen to be due thereon at the time of my decease, for her absolute use and benefit (*a*). I GIVE to the said [A. B.], my said son [*elder son*], and my son-in-law [*name*], ALL THAT my leasehold messuage or tenement, being No. —— in —— street, in the city of ——, with the garden and appurtenances thereto belonging, now in the occupation of [*tenant*], *To hold* the same unto them the said [*trustees*], their executors or administrators, for all the estate, term, and interest which I shall have therein at the time of my decease (*b*), upon the trusts following, (that is to say); UPON TRUST from time to time, out of the yearly rents and profits of the same leasehold premises, to pay and perform the rents and covenants reserved and contained by and in the lease by which the same premises are held, and to pay and apply the residue of such rents and profits unto my sister [*name*] or her assigns during her natural life; and after her decease, then UPON TRUST to assign the said leasehold premises to my daughter [*younger daughter*], her executors or administrators, for her or their own use and benefit. I GIVE unto my grandson [*name*] ALL THAT principal sum of 400*l.* secured by indentures of lease and release or mortgage, bearing date respectively on or about the —— and —— days of ——, and all arrears of interest which shall be due thereon at the time of my decease; and for the better enabling my said grandson to receive the said mortgage debt, I GIVE AND DEVISE to him all the lands and hereditaments situate in the parish of ——, in the county of ——, in and by the said indentures assured to me and my heirs for securing the same; *To hold* the same hereditaments unto and to the use of the said [*grandson*], his heirs and assigns for ever, subject, nevertheless, to such equity of redemption, if any, as may happen to be subsisting under or by virtue of the

(*a*) The debt is given to the daughter instead of being forgiven to the husband, in order to avoid the 10*l. per cent.* legacy duty, agreeably to a suggestion *ante*, Vol. 8, p. 456. This object should not be lost sight of in framing other gifts of personal property.

(*b*) *Vide ante*, p. 116.

same indenture of mortgage (*a*). I GIVE unto each and every of my nephews and nieces who shall be living at the time of my decease the sum of 50*l.*; and I direct that the legacies to such of my nieces as shall then happen to be under coverture shall be paid to them for their separate use, independently of their husbands; and the receipts of such nieces respectively alone shall be an effectual discharge to my executors for the said several legacies. And I direct that all the legacies bequeathed by this my will, of which no time of payment or delivery is specified, shall be paid and delivered within six calendar months after my decease, or earlier if convenient. And I also direct that the several legacies hereinbefore and hereinafter bequeathed, whether specific or general, shall be paid, delivered, and transferred to the several legatees free from legacy duty, which shall be paid and discharged out of my residuary estate or the produce thereof (*b*). I GIVE to my great nephew [R. S.], if he shall live to attain the age of twenty-one years, the sum of 100*l.*, to be paid to him immediately on the legacy becoming vested. I GIVE to the said [*trustees*] 500*l.* Three Pounds *per centum* Reduced Annuities, the same to be appropriated or purchased by them as soon as convenient after my decease (*c*), and to be held upon the

VARIOUS TRUSTS FOR CHILDREN.

Pecuniary legacies to nephews and nieces as to the latter for separate use.

Time of paying legacies.

Legacies to be free from legacy duty.

Legacy of stock.

(*a*) It is obviously convenient that the estate and the debt should become vested in the same person, in order to avoid the necessity of the legatee obtaining a conveyance of the legal estate from the testator's trustees, who are made the general devisees of his mortgage estates. If the mortgage debt should be paid off in the testator's lifetime, the legacy would be adeemed. Sometimes a testator provides against this event by a clause to the following effect:—

"And in case the said mortgage debt of 400*l.* shall be paid off in my lifetime, then, in lieu thereof, I GIVE to the said [*grandson*] the sum of 400*l.*, to be paid to him out of my general personal estate."

Substitution of a pecuniary legacy in case of the mortgage being paid off in the testator's lifetime.

(*b*) By a clause to this effect, duty on the sum applicable to the payment of the duty is saved. *Vide ante*, Vol. 8, p. 380.

(*c*) In bequeathing stock legacies, it should be distinctly shewn whether they are intended to be specific or general, or, in other words, whether the subject of gift is stock then belonging to the testator, or any stock that can be procured. The bequest in the text is evidently of the latter description; and, in general, the intention is best subserved by framing the

Suggestion as to stock legacies.

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trusts hereinafter declared, (that is to say); UPON TRUST from time to time to apply the dividends arising from the said annuities in and towards the maintenance and education of my great nephew [L. F.], during his minority, and, immediately upon his attaining the age of twenty-one years, UPON TRUST to transfer the said annuities to the said [L. F.] for his own use and benefit; and I direct that the said trust for maintenance shall take effect, notwithstanding that the parents or parent of the said [L. F.] shall be in circumstances enabling them to maintain and educate him (*a*): And in case the said [L. F.] shall die during his minority, then I direct that the said 500*l.* Three Pounds *per centum* Reduced Annuities shall sink into my residuary personal estate. I HEREBY DIRECT my executors, as soon as convenient after my decease, to purchase an annuity of 15*l.*, (free from legacy duty), for my old and faithful servant [*name*], during his natural life, such annuity to be purchased either from government or from one of the public offices or companies concerned in granting annuities, as my executors shall deem expedient (*b*). And I direct

Direction to purchase annuity.

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legacy in this manner; because the making it specific subjects the testator to the necessity of altering his will at every change of his securities. Explicitness on the point is important to prevent litigation. If the legacy is to be specific, it should be expressed in terms such as the following:—

"I GIVE to the said [*trustees*] the sum of 200*l.* Three Pounds *per centum* Reduced Annuities, now standing in my name at the Bank of England."

(*a*) Sometimes a power is given to the trustees to pay the income to the parent instead of applying it themselves, thus:—

Authority to pay the income to the parent of infant.

"And I authorize my trustees, if they think proper so to do, from time to time to pay over the income of the said trust fund to either parent of the said [L. F.], to be applied for his maintenance as aforesaid, and in such case my trustees shall be exempted from all responsibility in respect of the application thereof."

(*b*) It is sometimes convenient to provide for annuities in the manner here suggested, rather than as in a former precedent (*ante*, p. 234), in order to avoid keeping open the accounts and the final distribution of the general estate, which otherwise is suspended during the continuance of the annuity.

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that, until such purchase shall be made, the said annuity shall be paid out of my general personal estate in equal portions quarterly, the first of such quarterly portions to be paid at the expiration of three calendar months from the time of my decease. And I declare that the said [*annuitant*] shall not, nor shall his personal representatives, in case of his dying before the said annuity shall have been purchased, be entitled to elect to receive the price or value of the said annuity in lieu of and in substitution for the annuity hereinbefore directed to be purchased, any rule of equity to the contrary thereof notwithstanding (*a*). AND AS TO, FOR, AND CONCERNING all the residue and remainder of my real estate whatsoever and wheresoever, and also all my goods, monies, chattels, rights, credits, and all other the personal estate not hereinbefore specifically bequeathed, of which I shall be possessed at the time of my decease, or which I am empowered to dispose of, I GIVE, DEVISE, AND BEQUEATH the same unto the said [A. B.], my said son [*name*], and my said son-in-law [*name*], their heirs, executors, administrators and assigns, upon the trusts following, that is to say, as soon as conveniently may be after my decease, in the discretion and of the absolute authority of the trustees or trustee for the time being of this my will, and in such manner as they or he shall think proper, to sell, dispose of, collect, get in, and convert into money so much and such parts of the same residuary estate as shall not consist of money or government or real securities. And I hereby empower my trustees, in the execution of their said trust, to pay any monies which shall or may be claimed to be owing from me at the time of

Residuary devise and bequest.

(*a*) This clause is inserted with a view to guard against the doctrine which entitles a person for whom an annuity is directed to be purchased, as in the text, to elect to take the price or value instead of the annuity. The same right vests in his representative, if the legatee happens to have died before the purchase, and who, of course, declares his election to receive the price; and thus the gift becomes changed into a very different species of bounty from what the testator intended. *Dawson* v. *Hearn*, 1 Russ. & Myl. 606. See also *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Bayley* v. *Bishop*, 9 Ves. 6; *Palmer* v. *Crawfurd*, 3 Swanst. 482; *Brown* v. *Ross*, cit. 1 Russ. & Myl. 607.

Legatee's right to take the value of an annuity directed to be purchased.

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my decease, on such evidence as they shall think proper (*a*). And I further empower my said trustees to allow such time and to accept such security, real or personal, for the payment of any sum or sums of money which shall be owing to me at the time of my decease, as by them shall be deemed expedient; and also to refer to arbitration, or otherwise adjust any questions or disputes that may arise with any debtors or creditors of my estate. And I declare that the purchasers of any part of my real or personal estate, and all other persons paying to my said trustees or trustee any trust money belonging to my estate, and taking their or his receipt for the same, shall be discharged from all responsibility in respect of the application thereof; but I expressly declare that, notwithstanding the trust for sale and conversion hereinbefore contained, it shall be lawful for my trustees to postpone or defer the sale and conversion (*b*) of any part of my said real and personal estate, (but which real estate shall nevertheless be deemed to be of the nature or quality of personalty), for such period as to my trustees shall seem expedient, and that, until such sale and conversion, the income, if any, arising from the said real and personal estate, shall go and belong to the person or persons who would be entitled to the annual produce of the money arising therefrom, under the trusts hereinafter contained, if such sale and conversion had actually taken place. And I hereby empower my trus-

Power to compound debts, &c.

Power to suspend the sale and conversion.

Power to lease.

As to giving the trustees proper powers.

(*a*) The investing the trustees with adequate powers is a point of great importance; otherwise their course is beset with difficulties. For instance, a trustee cannot properly pay any debt, the existence of which is not legally proved; and yet to what injustice would the rigid exaction of such proof lead? It frequently happens (such a case is within the editor's recollection), that a testator, if a man of character and extensively engaged in business, has received into his hands small sums of money, to be either retained at interest or laid out for friends; and such transactions are too often managed, in consequence of the unlimited confidence reposed in the depositary, in the loosest manner, no document whatever being required from him. In such and many other instances, without an express authority, trustees are often compelled, by a regard to their own security, to turn a deaf ear to claims, of the rectitude of which they entertain no doubt.

(*b*) *Vide ante*, Vol. 6, p. 307.

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tees or trustee for the time being, to demise at rack rent for any term not exceeding twenty-one years in possession, any part of my freehold, copyhold, or leasehold hereditaments, which for the time being shall remain unsold under the trust aforesaid. And it is my will, and I declare that my said trustees shall stand possessed of my said residuary personal estate, and of the monies arising therefrom, and also from the sale of my said real estate, after paying thereout my just debts, funeral and testamentary expenses, and the pecuniary and other general legacies hereinbefore bequeathed, upon the trusts following, that is to say; As TO one equal fourth part or share thereof, IN TRUST for my said elder son [*name*], for his own absolute use and benefit; and in case he shall happen to die in my lifetime, then I give the said one-fourth part or share unto the executors or administrators of the said [*elder son*], to be applied and disposed of as part of his personal estate (*a*). AND

Trust concerning the produce of the residuary estate.

One-fourth for the elder son absolutely.

(*a*) This clause is introduced to guard against the possible event of the legatee dying before the testator, which is often a very prudent precaution. It is rather more common, however, to substitute merely the children of the legatee, which might be done by a clause to the following effect:—

"And I hereby direct and declare, that, in case the said [*elder son*] shall depart this life in my lifetime, leaving any child or children who shall survive me, then and in such case my trustees shall stand possessed of the said one-fourth share of my residuary estate and the produce thereof, IN TRUST for such child and children of my said son who shall attain the age of twenty-one years or marry, if more than one, in equal shares, for the absolute use and benefit of such child or children respectively; and in case any of such children shall, at the time of my decease, be under the age of twenty-one years and unmarried, then I direct that my trustees shall lay out and invest the presumptive share or shares of such child or children respectively, in government or real securities, and apply an adequate portion of the income arising therefrom for the maintenance and education of such child and children, and from time to time accumulate and invest the unapplied portion thereof; which accumulated fund shall, notwithstanding the investment thereof, still remain applicable, if occasion shall require, for the maintenance and education of the child or children respectively from whose

Clause substituting the children of the legatee in the event of his dying in the testator's lifetime.

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One other fourth to be invested upon trusts.

as to one other equal fourth part or share of the monies produced by or composing my residuary real and personal estate as aforesaid, I direct and declare that my trustees shall lay out and invest the same, in their own names, in government or real securities, and shall stand possessed of the said funds, and of any other securities of which the said last-mentioned one fourth share shall happen to consist, In trust from time to time to pay the annual income arising therefrom unto my younger son [*name*], or permit or empower him to receive the same during his natural life for his personal use and benefit, subject to the proviso hereinafter contained. Provided always, and I hereby declare, that if the said [*younger son*] shall alien or dispose of the said annual income, or if, by reason of his bankruptcy or insolvency, or by any other means whatsoever (*a*), the said annual income of the said trust fund can no longer be personally enjoyed by the said [*younger son*], but the same or any part thereof shall, or, but for this present proviso, would belong to or become vested in some other person or persons, then the trust hereinbefore expressed concerning the said annual income, or concerning so much thereof as shall or would have so become vested in any person or persons other than the said [*younger son*] as aforesaid, shall immediately thereupon cease and determine, and the same annual income shall be applied by my trustees during all the then residue of the life of the said [*younger son*] in the manner following, that is to say; Upon trust to pay and apply

For younger son for life.

Determinable on bankruptcy, alienation, &c.

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presumptive share or respective shares the same shall have arisen. And I also empower my trustees, in their discretion, to apply any portion not exceeding one half of the presumptive share or respective shares of any of such children for his, her, or their advancement in life."

Suggestion as to the terms of the proviso for *cesser* on bankruptcy, &c.

(*a*) I have expressed the clause in these terms, with a view to avoid any question being raised by the event of the legatee becoming bankrupt in the testator's lifetime, and obtaining his certificate, which would clearly not interfere with his personal enjoyment; though the unqualified manner in which, in such clauses, future bankruptcy is often made to subject the legatee's interest to the operation of the proviso, might seem to render it doubtful whether bankruptcy, even under such circumstances, did not determine, or rather defeat, the trust. It is probable, however, that the literal force of the words would be made to bend to the evident intent.

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the said annual income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children for the time being, if any, of the said [*younger son*], or such one or more of such wife, child, or children, and in such manner as my trustees in their discretion shall think proper; And in default of any object of the last-mentioned trust, at any period during the life of the said [*younger son*], and when and so often as the same shall happen, then UPON TRUST from time to time, so long as such vacancy or want of objects shall continue, to accumulate, and invest the annual income of the said trust fund in augmentation of the principal or capital thereof, in the nature of compound interest; and in case such trust for accumulation shall extend beyond the term or period allowed by law (*a*), then, UPON TRUST, to apply the said annual income, during such want of objects of the preceding trust as aforesaid, in such and the like manner as the same would be applicable under the ulterior trust hereinafter contained, if the said [*younger son*] were then actually dead. And from and after the decease of the said [*younger son*], UPON TRUST to pay the annual income of the said trust funds unto the present or any future wife of the said [*younger son*], who may happen to survive him, during the natural life of such wife; and after her decease, UPON TRUST to transfer the capital of the said trust funds unto and among all and every the child and children of the said [*younger son*] who shall attain the age of twenty-one years or marry, for his, her, or their absolute use and benefit, in equal shares, if more than one; And I direct that, if, at the decease of the said [*younger son*], or of the survivor of him and of any wife who may happen to survive him, any of such children shall be under the age of twenty-one years, and unmarried, then an adequate portion of the annual income arising from his, her, or their presumptive share or respective shares, shall be applied by my trustees for the maintenance and education of such child or children respectively; and I direct that the unapplied portion, if any, of such income shall from time to time be added to the capital of the share whence the same shall have arisen, but, nevertheless, the same shall continue liable to be applied, if occa-

If none, to accumulate.

After the decease of younger son, trusts for his wife and children.

Provision for maintenance.

(*a*) *Vide ante*, p. 65.

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sion shall require, to the maintenance and education of the child or children respectively from whose presumptive share or respective shares the same shall have arisen. AND I also empower my trustees, if it shall be deemed expedient, at any time after the decease of the said [*younger son*], or of the survivor of him, and of any wife who may happen to survive him, in the discretion of the trustees, or in the lifetime of the said [*younger son*], with his consent in writing, and afterwards in the lifetime of such surviving wife as aforesaid, with her consent in writing, to apply any part, not exceeding one-half of the principal of the presumptive share or shares of such child or children, if any, of my said [*younger son*] respectively, for his, her, or their advancement in life, in such manner as the said trustees, in their discretion, shall think proper. And in case the said [*younger son*] shall have no child who shall acquire a vested interest in the said trust funds under the trusts aforesaid, then I direct that my trustees shall stand possessed thereof, and of the income arising therefrom, after the decease of the said [*younger son*] and of any wife who might happen to survive him as aforesaid, UPON TRUST for my said [*elder son*], for his own absolute use and benefit (*a*). AND AS to one other equal fourth part or

Power of advancement.

As to one other

(*a*) As trusts, like those declared of the fourth share appropriated to the younger son and his family, are intended to protect him against his own imprudence, it is often proper to accompany such trusts with a power in the trustees to confer on the legatee for life an absolute interest, if his course of conduct, or the circumstances in his situation, which occasioned the imposition of the restrictions, should cease to exist. In such case, a clause to the following effect may be added:—

Power to trustees to pay moiety of trust monies to younger son.

"AND I HEREBY DIRECT AND DECLARE, that in case, at any future period, circumstances shall exist, which, in the opinion of the trustees for the time being of this my will, shall justify or render expedient the placing at the disposal of my said son [*younger son*] any portion of the one-fourth share in my residuary property, the trusts whereof are lastly hereinbefore declared, then it shall be lawful for such trustees to transfer absolutely to my said son, for his own proper use and benefit, any portion not exceeding one-half of the trust funds constituting such one-fourth share; and, immediately upon such transfer being made, the trusts hereinbefore de-

share of the trust monies arising from or composing my said residuary real and personal estate as aforesaid, I direct that my trustees shall stand possessed thereof upon the trusts following, that is to say; UPON TRUST, to lay out and invest the same monies in their own names in government or real securities, and to stand possessed thereof; and also of any other securities of which the said last-mentioned one-fourth share shall happen to consist, IN TRUST from time to time to pay the annual income arising therefrom unto my said daughter [*elder daughter*], or permit or empower her to receive the same during her natural life for her separate use, free from the control and debts of her present or any future husband, and so that she shall have no power to alien or anticipate the said annual income. And after the decease of my said daughter [*elder daughter*], IN TRUST for all and every the child and children of her the said [*elder daughter*], who shall attain the age of twenty-years or marry, for the absolute use and benefit of such child and children, if more than one, in equal shares. And I direct, that, after the decease of my said daughter, the income arising from the presumptive share or respective shares of any child or children of hers who shall be then a minor or minors and unmarried, or such portion thereof as my trustees shall think proper, shall be applied for the maintenance and education of such child or children respectively, until his, her, or their majority or marriage; and the unapplied portion, if any, of such income, shall be added to the principal of the share or shares respectively whence the same shall have arisen; but such accumulated fund, nevertheless, shall remain applicable, if occasion shall require, to the maintenance and education of the child or children from whose share or respective shares the same shall have arisen. And I also empower my trustees, if occasion shall require, after the decease of my said daughter [*elder daughter*], or in her lifetime with her consent in writing, to apply any part, not exceeding one half of the capital of the vested or presumptive share or respective shares of any of such child or children of my said danghter, for his, her, or their advancement in life; And in case my said

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fourth of the residue, upon trust for investment.

For separate and inalienable use of elder daughter for life.

At her decease for children at majority or marriage.

Provision for maintenance.

Power of advancement.

In default of

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clared concerning so much of the said share as shall be so transferred shall absolutely cease and determine."

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children, for daughter absolutely.

daughter [*elder daughter*] shall have no child who shall live to acquire a vested interest under the trust aforesaid, then I direct that my trustees shall stand possessed of the said one-fourth share in the said residuary estate, IN TRUST for her my said daughter [*elder daughter*] for her own absolute use and benefit.

Remaining fourth part for younger daughter and her children, upon similar trusts.

AND AS TO the other or remaining fourth part or share of my said residuary estate and the produce thereof, I direct and declare that my trustees shall stand possessed thereof for the benefit of my said [*younger daughter*] and her children, upon and for trusts and purposes, and with and subject to powers and authorities, similar to, and in all respects corresponding with, the trusts, purposes, powers, and authorities expressed and declared concerning the one-fourth share lastly hereby bequeathed in trust for my said daughter [*elder daughter*] and her children, as effectually as if the same trusts were here repeated, and upon or for no other trust, intent, or purpose whatsoever.

Devise of trust estates.

I GIVE to the [*trustees*], and their heirs, all the real estate vested in me as trustee, UPON TRUST to carry into effect the trusts affecting the same respectively.

— of the residue of estates in mortgage.

I ALSO GIVE to the said [*trustees*], and their heirs, all such parts as are not hereinbefore devised of the real estate vested in me as mortgagee, UPON TRUST to receive, for the benefit of my trust estate, the monies secured by such mortgages respectively, and execute such assurances of the said estate as the nature of the case may require (*a*). (*Power to vary funds, and appoint new trustees, indemnities to trustees, and exoneration to persons paying trust monies to them, and appointment of executors, as in the precedent, ante, p.* 233). IN WITNESS, &c.

(*a*) It is not correct, as is often done, to make the reconveying to the mortgagor the sole purpose of the devise, as it may be found convenient to transfer the mortgage to a third person.

DIRECTIONS FOR CARRYING ON TRADE.

WILL *of a* TRADER, *a married man. Bequest of (inter alia) Household Goods, &c. (of which an Inventory is to be taken), to Wife for Life. Directions for the carrying on of Testator's* TRADE *by his Wife until* ONE *of his* SONS *attains* TWENTY-ONE *Years, who is then to* HAVE *the Business on certain Terms.* RESIDUARY BEQUEST *in trust for* WIFE *and* CHILDREN, *and the* ISSUE *of deceased* CHILDREN PER STIRPES.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE to my son [*name*] my watch and seals. I GIVE to my son [*other son's name*] my copy of ——, or such one other of my printed books (whether consisting of one volume or more), as he may choose to select in preference thereto. I GIVE to my wife [*name*] the residue of my trinkets, my wearing apparel, wines, and other consumable housekeeping stores, (other than such as may form part of my stock in trade), and also the horse and chaise, if any, of which I shall be possessed at the time of my decease, for her own absolute use and benefit; and I give to her, my said wife, the possession and use of my household furniture, plate, linen, china, glass, pictures, and my printed books (except as aforesaid), of which I shall be possessed at the time of my decease, during her life; and after her decease I give the same to my said son [*name*] absolutely, if he shall be living at the decease of my said wife; but if he shall be then dead, I give the said effects unto my other child or children who shall be living at such decease, equally to be divided between or among them, if more than one, the partition and division thereof among such children to be made by the trustees for the time being of this my will, in such manner as they in their discretion shall think proper. And I direct that, as soon as convenient after my decease, an inventory shall be made of the said effects hereinbefore bequeathed to my said wife for her life, one copy whereof shall be kept by

Legacy of watch.

Use of furniture, &c. to wife for life.

Inventory to be taken.

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her, and the other shall be deposited with my other trustees. I nominate and appoint my said wife and [*two trustees*] executrix and executors of this my will. And I will and direct that my said wife shall carry on, manage, and conduct my trade or business of a corn-chandler at —— during such period and for such intents and purposes as hereinafter mentioned; and for the purpose of enabling her to carry on, manage, and conduct the said trade or business, I direct that she shall, during the said period of her carrying on the same, have the occupation of the messuage or dwelling-house in which the same is now carried on (the rent and taxes whereof shall be charged to the trade), and the entire use, disposal, and management of all the capital, credits, stock, and effects which shall be in, due, owing, or belonging to me in my said trade or business at the time of my decease. And I do hereby authorize her, for the purpose aforesaid, to employ and hire all such clerks, servants, workmen and others, and allow such sums of money for their salaries, wages, or hire, as she shall think fit and proper. And I will and direct that my said wife shall so carry on my said trade or business until my eldest son shall attain the age of twenty-one years, or in case of his death under that age, or, having attained that age, in case he shall thereupon decline or refuse to take to and carry on the said trade or business, then until some one of my other sons shall first attain the age of twenty-one years, and upon attaining that age shall be desirous to take to and carry on the said trade or business, or in case none of my sons shall live to attain the age of twenty-one years, or, having attained that age, in case none of them shall be desirous to take to and carry on the said trade or business, then until the decease of her my said wife. And I hereby authorize and empower the trustees or trustee for the time being of this my will, so long as my trade or business shall be carried on by my wife as aforesaid, from time to time to augment or diminish the capital employed therein, according to the exigencies thereof. And I direct that my said trustees or trustee shall be allowed free access to the books and accounts employed in the said business, so long as the same shall be carried on, during the life of my said wife, either by her, or by any or either of my sons as aforesaid. And I will and direct that the clear gains and profits to arise from or to be produced by my said trade or business, during such time as the same shall

Appointment of executors.

Wife to carry on business until eldest or some other son attains twenty-one and consents to carry it on.

Power to trustees to augment or diminish the capital in the trade.

DIRECTIONS FOR CARRYING ON TRADE.

One half part of the gains to be retained by the wife, and the other to be applied to the maintenance of the children, at her discretion. Terms on which the son is to take to the business.

be carried on by my said wife as aforesaid, shall be paid, applied, and disposed of in manner following; that is to say, my said wife shall have and be entitled to one moiety of the said gains and profits for her own use and benefit absolutely, and the remaining moiety of the said gains and profits shall be paid and applied for the maintenance, support, and education of all my children for the time being, in such shares and proportions, and in such manner as my said wife shall in her discretion think proper. And I do hereby will and direct that such one of my sons, who having attained his age of twenty-one years shall, within six calendar months next after he shall attain that age, first signify his desire in writing to my said trustees of taking to and carrying on my said trade or business, shall have and be entitled to my said trade or business, and the good-will thereof, and the capital, credits, stock and effects then in, due, or belonging to the same, for his own use and benefit, upon the terms following; that is to say, I direct that the leasehold messuage in which the said trade or business is carried on, and the capital, credits, stock, and effects of the said trade, (exclusively of the good-will thereof, for which my son is not to be required to give any consideration whatsoever), shall be valued and appraised by two persons, one of whom shall be chosen by my son so desiring to carry on my said trade, and the other by my trustees; and in case such two persons shall not agree in their valuation and appraisement, then the same shall be valued and appraised by such one person as the said two first referees or arbitrators shall for that purpose appoint umpire. And my said son who shall so take to my said trade shall thereupon, at his own costs and charges, secure to my trustees, by his bond or obligation, in a sufficient penalty, such sum of money as the leasehold messuage, capital, credits, stock, and effects of the said trade shall amount unto, according to such a valuation and appraisement as aforesaid, such sum to be made payable within six calendar months next after the decease of my said wife, without interest for the same in the mean time; upon which bond so to be given, a memorandum or defeazance shall be indorsed, exempting or exonerating my son so executing the said bond, his heirs, executors, and administrators, from so much of the principal money thereby secured, as, under or by virtue of the trusts hereinafter by me

DIRECTIONS FOR CARRYING ON TRADE.

declared of such principal money, shall be the amount of his share thereof. And I direct and declare that my trustees and executors shall make and execute to my son, so taking to my trade or business as aforesaid, and at his costs and charges, such assignments and assurances as shall be requisite for effectually vesting in him the said leasehold messuage or dwelling-house, stock, effects, and premises, and putting him into full and complete possession thereof. And I also will and direct that in the meantime, after my said son shall take to and carry on my said trade or business, until the decease of my said wife, the clear gains and profits of my said trade or business shall from time to time be paid, applied, and disposed of in manner following; that is to say, two-fifth parts thereof shall belong to and be retained by such son for his own use and benefit absolutely, and the remaining three-fifth parts thereof shall be paid to my said wife, to the intent that the same may be applied by her for the maintenance and support of herself and my children for the time being (except my said son so carrying on my said trade or business), and after the decease of my said wife, the whole of the gains and profits of my said trade shall belong to and be the property of my said son so carrying on my said trade. PROVIDED ALWAYS, that in case my said wife shall happen to die before any one of my said sons shall attain the age of twenty-one years, or in case not one of my sons, having attained that age, shall within six calendar months signify in writing to my said wife his desire to take to and carry on my said trade or business, or in case my wife shall be unwilling to carry on and manage the same as hereinbefore directed, then I direct that from and after the decease of my said wife, or her relinquishment of the said trade or business, as the case may be, the good-will of my said trade, and the capital, credits, stock, and effects which shall be then in, due, or belonging to my said trade, and my said leasehold messuage in which the same is carried on as aforesaid, shall be forthwith sold, disposed of, and converted into ready money by my trustees for the time being, and the money which shall arise by such sale, disposition, and conversion, shall be subject to the trusts hereinafter declared of my residuary personal estate. AND AS TO, FOR, AND CONCERNING the said bond so to be given by my son who shall so carry on my said trade or business as

Appropriation of the gains of the business carried on by the son.

In case of the decease of wife before any son shall attain twenty-one, and consent to carry on the business, then the good-will, stock, &c. to be sold, and the money to be considered as part of the residue.

As to the bond to be given by the son, and all the residue—

aforesaid, and the principal monies thereby secured, and also as to, for, and concerning all the residue and remainder of my goods, chattels, and personal estate, of what nature or kind soever, not hereinbefore by me otherwise disposed of, subject to the payment of my debts and funeral and testamentary expenses, I do hereby give and bequeath the same unto the said [*trustees*], their executors, administrators and assigns; UPON TRUST, nevertheless, that my trustees for the time being shall and do receive, recover, and get in the principal monies which shall be secured by virtue of the said bond (with power, nevertheless, if deemed expedient, to continue the loan to my son until the monies shall be wanted for distribution); and also shall and do, as soon as conveniently may be after my decease, sell, dispose, and convert into ready money all the residue of my personal estate; and lay out and invest the monies to arise from the sale or disposition of, or otherwise to be produced from the residue of my personal estate, and also such part of the residue of my personal estate as shall consist of monies, in the names of them my trustees in some or one of the public stocks or funds of Great Britain, or upon government or real securities in England, to be from time to time altered, varied, and transposed for or in lieu of stocks, funds, or securities of the like nature, when and as often as they, he, or she shall think proper; and shall and do stand possessed of and interested in the monies so to be received, recovered, and got in, and to arise by the sale and disposition of, or otherwise to be produced from the residue of my personal estate, and of which the same shall consist as aforesaid, and the stocks, funds, and securities in or upon which the same shall be invested, upon and for the trusts and purposes following; that is to say, UPON TRUST to pay the dividends, interest, and annual produce of the said trust funds and premises unto my said wife, or permit or empower her to receive the same during her natural life, to be applied by my said wife for the support and maintenance of herself and my children for the time being, in such proportions and manner as she shall think proper; and from and after the decease of my said wife, UPON TRUST that they my said trustees and trustee for the time being shall and do stand possessed of and interested in the residue of my personal estate, and of and in the stocks, funds, and securities in or upon which the same shall or may be re-

DIRECTIONS FOR CARRYING ON TRADE.

bequest of the same to trustees, to convert the same into money and invest it.

Power to vary securities.

Interest to wife for life, to be applied for maintenance of herself and children.

After the decease of wife, in trust for the children then living, and the issue of deceased

DIRECTIONS FOR CARRYING ON TRADE.

children *per stirpes.*

spectively invested, IN TRUST for all and every the child and children of mine who shall be living at the decease of my said wife, and who shall attain the age of twenty-one years, or marry, as tenants in common, if more than one; and also the issue then living, and who shall attain the age of twenty-one years or marry, of any child or children of mine who shall have died in the lifetime of my said wife, (whether in my lifetime or after my decease), such issue through all the degrees to take *per stirpes* as tenants in common, if more than one, the share or respective shares which his or their parent or respective parents would have been entitled to if living; for the absolute use or benefit of such child, children, or issue respectively. And in case no child of mine, or the issue of any deceased child, shall be living at the decease of my said wife, or, being such, he, she, or they die under the age of twenty-one years, and without having been married, then UPON TRUST to transfer the said trust funds and premises to my brother [*name*], for his own absolute use and benefit. PROVIDED ALWAYS, and I hereby declare, that the trust or direction hereinbefore imposed on my said wife to apply a portion of the gains and profits of trade, or other annual income, for the support and maintenance of my children for the time being, shall not implicate my trustees in any responsibility respecting the application thereof, nor shall the same extend to any son or sons of mine after he or they respectively shall have attained the age of twenty-one years, or shall have married, or any daughter of mine after she shall have married, nor for any longer period than she shall be willing to reside with my said wife, it being my intention merely to provide my daughters with a home, and not to support a separate establishment for them. *(Provision for maintenance, in case, at the decease of the wife, any child or children of the testator, or the issue of any deceased child or children, should be under age and unmarried. Also power of advancement, and other usual clauses as in former precedents. Appointment of wife and trustees to be guardians of minor children during their respective minorities).* IN WITNESS, &c. (*a*).

Proviso, explanatory of the trust for maintenance.

(*a*) The Editor has just been informed that the decree of the Vice-Chancellor in *Goblet* v. *Beechy*, noticed *ante*, p. 156, has been reversed by the Lord Chancellor.

WILL *devising* REAL ESTATE *to* TRUSTEES *for* SALE, *the* PROCEEDS *whereof are blended with the* GENERAL PERSONAL ESTATE, *which is vested in the same Trustees, to be laid out on Security for the Benefit of the Testator's* WIFE *and* CHILDREN, *the Wife taking a Life Interest in* ONE MOIETY, *and, subject thereto, the* CAPITAL *in the whole is bequeathed in Trust for the* CHILDREN *in* UNEQUAL SHARES, *with a substituted Gift to their Issue in the event of Death under the vesting Age.* DAUGHTERS' *Shares settled in the usual manner, in Trust for* THEM *and their* CHILDREN, *on the Failure of whom each Daughter's Share goes (subject to Power of bequeathing Life Interest to any* SURVIVING HUSBAND*), to the Testator's other Children, and the Issue of deceased Children, in like Manner with their original Shares. Gift of* LIFE ANNUITIES, DETERMINABLE *on* ALIENATION *by* ANNUITANTS WHEN DISCOVERT. POWER *to* TRUSTEES *to* INVEST TRUST MONIES *in the* PURCHASE *of* LAND (*a*). EXTENSIVE POWERS *to* TRUSTEES *in* WINDING UP *the Testator's* AFFAIRS.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE, DEVISE, LIMIT and APPOINT unto [*trustees*], of &c., their heirs and assigns, All the freehold and copyhold messuages, lands, tenements and hereditaments, in possession, reversion, remainder, or expectancy, whereof or wherein I am, or any person or persons in trust for me is or are, seised or interested, or over which I have a disposing power, (except such hereditaments as are vested in me as a trustee or mortgagee), with their and every of their rights, members, and appurtenances, To hold the same unto and to the use of the said [*trustees*], their heirs and assigns,

Devise and appointment of real estate.

(*a*) *Vide* also forms of this power, *ante*, Vol. 9, p. 167. Most of the clauses in Settlements might be made, by slight alterations, applicable to Wills.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

for ever; UPON TRUST, as soon as conveniently may be after my decease, to make sale and absolutely dispose thereof, either altogether or in parcels, and either by public auction or private sale, or partly in one mode and partly in the other, and at such price or prices as my trustees or trustee for the time being shall think proper, with liberty, if deemed expedient, for such trustees or trustee from time to time to buy in all or any part or parts of the hereditaments which shall be offered for sale by public auction, and, upon trust, to sell and absolutely dispose of the premises so bought in at any future auction or auctions, or by private sale or sales, or partly in one mode and partly in the other, and with all such powers as are hereinbefore given in regard to any original sale or sales, auction or auctions, without being liable for any loss or diminution in price in consequence thereof. And also upon trust from time to time to make, do, and execute all proper acts, contracts, deeds, and assurances for carrying such sale or sales into complete effect (*a*), with full power

(*a*) These powers are expressed with far more than necesary copiousness of detail, but will probably be preferred by some draftsmen who are favourably disposed to the verbose forms, which until the last few years were in general use. The devise in trust for sale might be shortly expressed as follows:—

Shorter form of trust for sale.

"I give to [*trustees*] all my real estate, whatsoever and wheresoever, and also any real estate which I have power to dispose of, *To hold* the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, *Upon trust*, as soon as convenient after my decease, to sell the same by public auction or private contract, with liberty from time to time, if deemed expedient, to buy in any part thereof at any auction, and to rescind or vary the terms of any contract for sale that may have been entered into, and to convey such parts of the said estate, as from time to time shall be sold, in such manner as the respective purchasers thereof shall direct. And I declare, that such purchasers respectively shall be exonerated from all responsibility in respect of the application of the monies paid by them respectively to the trustees or trustee for the time being of this my will. And I further declare, that my said trustees shall stand possessed of the monies to be produced by such sale or sales as aforesaid, after deducting the expenses attending the same, upon the trusts hereinafter expressed, &c."

for the said trustees or trustee to consent to any variation in the terms of such contract, and to commence, prosecute, abandon, defend, or submit to arbitration any action, suit, or proceeding at law or in equity for compelling a specific performance of every or any such contract, or to abandon and rescind the same, and release the purchaser or purchasers therefrom, and at any time or times thereafter proceed with all his or their original powers to a resale or resales of the premises, as the said trustees or trustee shall think advisable, without being answerable for any loss or diminution in price, or for any other damage which shall be produced by the exercise of all, any, or either of the discretionary powers given to them or him by this my will. And I do hereby declare that the person or persons who shall become the purchaser or purchasers of the said freehold and copyhold hereditaments and premises, or any part thereof, and pay his, her, or their purchase money, or respective purchase monies, or any of them, or any part or parts thereof, to the said trustees or trustee for the time being of this my will, or to any other person or persons under their or his direction, shall not be obliged to see to the application of the purchase money or purchase monies so paid, nor be accountable for the mis-application or non-application of the same; but that all receipts for purchase monies which shall be given by the said trustees or trustee, or by any other person or persons to whom the same shall be paid under their or his direction, shall be sufficient discharges for the monies therein or thereby acknowledged to be or to have been received. AND I DO HEREBY DECLARE, that the said trustees or trustee for the time being of this my will shall stand possessed of the monies which shall arise from the sale or sales hereinbefore directed to be made of my said freehold and copyhold hereditaments and premises, UPON TRUST, in the first place, to deduct and retain all costs and expenses which they or he shall have disbursed or incurred in the performance of the aforesaid trusts, or in relation thereto, and to hold, apply, and dispose of the residue or surplus of the said monies upon the trusts, and for the ends, intents, and purposes hereinafter declared and expressed of and concerning the same. And I hereby declare, that such part of my real estate as shall from time to time remain unsold and undispos-

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

Purchasers not to be bound to see to the application of purchase monies.

Trust concerning purchase monies.

Real estate unsold to be deem-

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

ed of under or by virtue of the trust hereinbefore contained, and the rents and profits arising therefrom, shall be, to and for all intents and purposes whatsoever, considered and deemed as personal estate. AND I FURTHER DIRECT AND DECLARE, that it shall be lawful for the trustees or trustee for the time being of this my will to demise or let, from year to year, at rack rent, such part or parts of my real estate hereinbefore devised, as shall from time to time remain unsold and undisposed of as aforesaid, or to grant leases thereof for any term not exceeding twenty-one years in possession, without taking any fine, premium, or foregift for the granting of such leases respectively. I GIVE to my affectionate wife [*name*] the leasehold messuage or dwelling-house in which I reside, at ——, to hold the same unto my said wife, her executors or administrators, for all the term and estate which shall have to come therein at the time of my decease. I also give to my said wife all the household furniture, plate, linen, china, glass, trinkets, printed books, horses and carriage, coals, wines, liquors, and housekeeping provisions, of which I shall be possessed at the time of my decease, or such part thereof as my said wife shall choose to select and retain for her own absolute use and benefit. I give unto my sister [*name*], during her life, an annuity of 50*l.*, free from legacy duty and every other deduction, the same to be paid in equal portions, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each year, (the first quarterly payment to be made on such of the said days as shall first happen next after my decease). I ALSO GIVE unto my niece [*name*], during her life, an annuity of 30*l.*, to be paid quarterly, on the days of payment hereinbefore mentioned, free from legacy duty and every other deduction. And I hereby direct, that my trustees shall and do, as soon as conveniently may be after my decease, appropriate and set apart sufficient funds, whereby or wherewith to pay and satisfy the said several annuities; which said funds so to be appropriatedand set apart, shall, subject to the payment of the said annuities respectively, be considered as part of my residuary personal estate. PROVIDED ALWAYS, and I do hereby will and direct, that the annuities respectively hereinbefore bequeathed, shall be for the separate use of my said sister and niece respectively, independently of any husbands or husband with whom,

ed personal estate.

Power to lease.

Leasehold messuage to wife.

Household furniture, &c. to wife.

Annuities to testator's sister and niece.

Annuities to be for separate use, and without power of anticipation.

at the time of my decease or afterwards, they or either of them may have intermarried, or may intermarry, and without power of anticipation during any coverture or covertures of my said sister and niece respectively. And I further declare, that if they or either of them the said [*sister*] and [*niece*], when not under coverture (*a*), shall assign, dispose of, or otherwise part with, or incumber, at law or in equity, the annuities or annuity hereinbefore by me bequeathed to them or her, or any part of their or her right or interest therein, or any unaccrued payment thereof, or in case the same annuities respectively shall become vested in or liable to be disposed of by any person or persons whomsoever, other than the said [*sister*] and [*niece*] respectively, then, and in such case, the said annuities or annuity, with respect to which the same shall happen, shall immediately thenceforth cease, determine, and be absolutely void to all intents and purposes whatsoever. I NOMINATE AND APPOINT my said wife during her widowhood, and also the said [*trustees*], to be executrix and executors in trust of this my will, and guardians of the persons and estates of such of my children as shall be under the age of twenty-one years and unmarried at the time of my decease (*b*). And I bequeath to each of them the said [*trustees*] the sum of 100*l.*, in consideration of the trouble they will have in executing the trusts of this my will. I request that mourning rings of the value of £—, be given to my friends [*other friends*] as a mark of my esteem. AND AS TO ALL THE RESIDUE AND REMAINDER of my personal estate and effects, whatsoever and wheresoever, not hereinbefore specifically disposed of, including any personal estate over which I have a power of appoint-

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

Proviso for cesser.

(*a*) The established doctrine is, that a *feme covert* may be restrained from alienation without any clause of *cesser;* but a person not under coverture, whether man or woman, cannot: (*Vide ante*, Vol. 6, p. 36): though this distinction seems to have been lost sight of in the recent case of *Newton* v. *Reid*, 4 Sim. 141, where the Vice-Chancellor is reported to have ruled, that a gift over was necessary in order to restrain alienation by a *feme covert.* It will be observed, that the clause in the text, by confining the proviso for *cesser* to the acts of the annuitants *when discovert*, assumes the distinction in question, which, indeed, has long been considered a settled point in conveyancing.

As to restraints on alienation.

(*b*) *Vide ante*, p. 4.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

ment, I give and bequeath the same unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts following; that is to say, UPON TRUST to sell or dispose of, collect, get in, and convert into money so much and such parts of the same residuary estate and effects as shall not consist of money. And I hereby empower my said trustees or trustee in execution of the said trust, to compound for or allow such time, or accept such security, real or personal, for the payment of any sum or sums of money which shall be owing to me at the time of my decease, as by them or him shall be deemed expedient, whether the debts so compounded for shall be secured or not; and also to refer to arbitration, or otherwise adjust, settle, or compromise any questions or disputes that may happen to arise with my partner, or any other person or persons, concerning any accounts or transactions whatever. And upon the settlement or winding up of any such accounts or transactions, I hereby empower the trustees for the time being of this my will, (if they shall think proper), to give and execute to any accounting or responsible party or parties full and complete releases and discharges from all claims and demands whatsoever, whether, according to the general rule of equity, the giving of such receipts and discharges shall be strictly within the scope of their authority or not; and I further empower my said trustees or trustee, if deemed expedient, to pay any sum or sums of money claimed to be owing from me, although such claim may not be substantiated by strictly legal evidence, or although the same may have become irrecoverable by lapse of time. PROVIDED NEVERTHELESS, and I hereby declare, that this present clause shall not be construed to revive, or in any manner perpetuate any claim or demand against my estate. AND I hereby declare that, notwithstanding the trust for sale and conversion hereinbefore contained, it shall be lawful for my said trustees or trustee to postpone and defer the sale and conversion of any part of my said real or personal estate for such period as to them or him shall seem expedient, and that until such sale and conversion, and until the money to be produced thereby shall be invested in the manner hereinafter directed, the income arising from the said real or personal estate shall be received by my trustees in augmentation of the principal or capital of the said trust estate, and my said trus-

Discretionary power to trustees.

Special provisions respecting income, until the conversion of the property.

tees in lieu thereof shall pay and allow to the person or persons, who would be entitled to the annual produce of my residuary estate under the trusts hereinafter contained, if such sale and conversion and investment had actually taken place, the yearly sum of £——, to commence and be computed from the time of my decease, and to be payable in equal quarterly portions until my affairs shall be wound up, and the clear net produce of my estate shall be placed out on security, pursuant to the trust hereinafter contained (*a*). And it is my will, And I hereby direct and declare, that the trustees for the time being of this my will shall stand possessed of the monies arising from my real estate hereinbefore devised, And also, the monies arising from my residuary personal estate and effects hereinbefore bequeathed, Upon trust, by, with, or out of the same monies respectively, to pay or satisfy and retain all my just debts, funeral and testamentary expenses, and all expenses incident to the trusts hereby created, and the pecuniary legacies, and to provide a fund for the annuities respectively hereinbefore bequeathed; And upon further trust, to lay out and invest the surplus of the same monies in the names or name of my said trustees or trustee, in or upon the public stocks or funds, or other government securities of the United Kingdom, or on mortgage or any other real securities in England or Wales; with power for my said trustees or trustee to vary and transpose, as well the stocks, funds, and securities whereon such investment shall be made as aforesaid, as the stocks, funds, or securities which may at my decease compose part of my said personal estate, from time to time, as often as occasion shall require, or as shall be found expedient. And as to all and singular the said trust monies, stocks, funds, and securities, I direct and declare, that my trustees shall stand possessed thereof upon the trusts following; that is to say, Upon trust, from time to time, to pay one moiety or equal half part of the dividends, interest, and

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

Trust concerning the produce of the real and personal estate.

Trust for investment.

Interest of one moiety to wife

(*a*) Where a testator's property is extensively embarked in trade, or is, on any other account, so situated as to render it inconvenient to give the legatees for life of the produce the actual income of the unconverted property, *ut ante*, p. 327, this seems to be the best mode of avoiding the difficulty.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

during widowhood.

annual produce arising therefrom unto my said wife, or permit or empower her to receive the same during so long of the term of her natural life as she shall continue my widow and unmarried (*a*); And as to, for, and concerning as well the said moiety or equal half part of the said trust monies, stocks, funds, and securities (subject as aforesaid), as also the other moiety or equal half part thereof immediately after my decease, IN TRUST for all and every my child and children, who, being a son or sons, shall attain the age of twenty five years, or, being a daughter or daughters, shall attain the age of twenty-one years, or marry with the consent of her or their guardians for the time being, for the absolute benefit of such children respectively, the shares of such of my children respectively as shall be sons, to be double or twice the amount of the shares of such of them as shall be daughters, or in the proportion of two to one, and all the shares respectively to be interests vested in such children respectively at the several ages or periods aforesaid. PROVIDED NEVERTHELESS, and it is my will, that in case any or either of my children shall depart this life before he, she, or they shall have acquired a vested interest or vested interests in the said trust premises under the trusts aforesaid, leaving lawful issue living at his, her, or their decease or respective deceases, then, and in such case, I direct and declare, that the issue of the child or children respectively so dying shall, if and when such issue respectively shall live to attain the age of twenty-one years, take and be entitled to (if more than one, equally among them) the share or respective shares in the said trust premises, which his, her, or their parent or respective parents would have taken under

Trust for children, sons' shares being double those of daughters.

Clause substituting the issue of children dying before the vesting age.

(*a*) This precedent, and two others which have preceded it, (*ante*, pp. 233, 261) exhibit much variety in the mode of providing for the testator's widow. In the first in order, (*ante*, p. 233), the widow takes the entire income for her own use during her widowhood; in the next, (*ante*, p. 261), she takes the income for life, charged with the maintenance of the testator's children; and in the present instance, the widow takes an immediate life interest in a moiety during widowhood; the other moiety being given to the children, on failure of whom before the vesting age, the widow also takes an interest for life (not during widowhood merely) in this moiety.

the trusts aforesaid, if he or they, being a son or sons, had attained the age of twenty-five years, or being a daughter or daughters had attained the age of twenty-one years or been married with such consent as aforesaid. But, in case no child of mine, being a son, shall live to attain the age of twenty-five years, or shall die under that age leaving lawful issue living at his decease, or no such child, being a daughter, shall live to attain the age of twenty-one years, or to marry with such consent as aforesaid, or shall die leaving lawful issue living at her decease as aforesaid; then I declare that the said trustees for the time being of this my will shall stand possessed of the moiety or equal half part of the said trust monies, stocks, funds, and securities aforesaid, not hereinbefore bequeathed in trust for my said wife during her widowhood, or so much thereof as shall not have been applied and disposed of under the power of advancement hereinbefore contained, UPON TRUST to pay the dividends, interest, or annual produce arising from such last-mentioned moiety unto my said wife, or permit her to receive the same during her life; and after her decease, then as to the entirety of all and singular the said trust premises, in the events aforesaid, UPON SUCH AND THE LIKE TRUSTS, and to and for such and the like intents and purposes, and with, under, and subject to such and the like powers, provisoes, and declarations, for the benefit of my niece [*name*] and her children, or her surviving husband, being such appointee as aforesaid, as are hereinafter expressed and declared concerning the share of each of my daughters in the said trust premises, as fully and effectually in all respects as if the same were here repeated: And in case my said niece shall die without leaving any child who shall acquire a vested interest under the trust lastly hereinbefore contained, then as to all and singular the said trust premises, after the decease of my said niece, and after the determination of the interest of any surviving husband of her my said niece, being such appointee as aforesaid, IN TRUST for my friends [*trustees*], in equal shares for their own proper use and benefit. PROVIDED ALWAYS, and I hereby declare, that in case, at my decease, any of my sons shall be under the age of twenty-five years, or any of my daughters shall be under the age of twenty-one years and unmarried, then I direct that the trustees for the time being of this my

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On failure of children.

Remaining moiety to wife for life;

and, subject thereto,

Upon trusts for testator's niece and her children.

Trust for maintenance before the vesting age.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

will shall (subject nevertheless and without prejudice to the trust hereinbefore declared concerning the income of one moiety of the said trust premises for my wife during widowhood as aforesaid) apply in or towards the maintenance and education, or otherwise for the benefit of such children respectively, until they respectively shall acquire vested interests in the said trust premises under the trusts aforesaid, the interest, dividends, and annual produce arising from the expectant or presumptive share or respective shares of such child or children under the trusts aforesaid, or such part thereof as the said trustees or trustee shall think proper; and the unapplied residue, if any, of such dividends, interest, and annual produce, shall be added to the capital of the share or respective shares whence the same shall have arisen, subject nevertheless to be afterwards applied in or towards the maintenance of such child or children respectively, from whose presumptive share or respective shares the same shall have arisen, if the said trustees shall think proper so to apply the same. And I further declare, that the provision for maintenance lastly hereinbefore contained shall equally extend and be applicable to the expectant or presumptive or respective shares of the issue of any child or children of mine who shall die leaving issue in the manner hereinbefore mentioned, until such issue shall attain the age of twenty-one years, when he, she, or they will acquire a vested interest or vested interests respectively, in his, her, or their parent's or respective parent's shares, under the provision in that behalf hereinbefore contained. PROVIDED ALSO, and I further direct and declare, that it shall be lawful for my said trustees or trustee for the time being, with the consent in writing of my said wife during her widowhood, and, after her decease or marriage, at their or his own discretion, to apply any part of the principal of the presumptive or contingent share, or respective presumptive or contingent shares, of any one or more of my said children, or the issue of such children, in the said trust funds and premises, (including both the moieties into which the same are for certain purposes hereinbefore divided), before the period of the vesting of such shares respectively under the trusts aforesaid, in or towards establishing my son or sons respectively in some profession or business, or otherwise for his, her, or their advancement or pre-

Provision for maintenance to extend to issue.

Power of advancement.

ferment in life, as my said trustees or trustee shall think proper. But I earnestly injoin and request my trustees, in exercising this present power, not to endanger the future interests of my children by placing their property in their hands prematurely, and before they have acquired sufficient experience to capacitate them for the prudent and judicious management thereof; but this injunction is not to be construed to fetter, in the least degree, the discretionary power of my trustees under the clause aforesaid. AND I HEREBY DIRECT AND DECLARE, that the share of each of my children who shall be daughters, and shall attain the said age of twenty-one years, or marry with such consent as aforesaid, or shall marry with my consent in my lifetime, (which shall for all the purposes of this my will be considered as a marriage with consent), shall not be paid or transferred absolutely to such respective daughter, but shall be held by my trustees or trustee for the time being, (subject nevertheless to the trust concerning the income arising from one moiety of the trust premises in favour of my said wife during widowhood as aforesaid), upon the trusts hereinafter expressed, that is to say, UPON TRUST to continue or lay out the same respective share in the names or name of the said trustees or trustee, in government or real securities in the United Kingdom, from time to time, varying the same as often as shall be deemed expedient; And from time to time to stand possessed of the said stocks, funds, and securities, upon the trusts following; that is to say, UPON TRUST to receive the dividends, interest, and annual produce of the said stocks, funds, and securities, and from time to time to pay the same unto or permit the same to be received by my respective daughter, during the term of her natural life, for her separate use, free from the control and debts of any husband with whom she may intermarry; and so that, during any coverture she may be under, such daughter of mine shall have no power to alien or anticipate the growing payments of the said dividends, interest, and annual produce, or any part thereof; And immediately after the decease of such respective daughter of mine as aforesaid, then as to as well the said trust monies, stocks, funds, and securities, forming the share of such daughter as aforesaid, as the yearly dividends, interest, or produce thenceforth arising therefrom,

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

Trusts concerning daughters' shares.

For daughter for life for her separate and inalienable use; and subject thereto;

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

In trust for the children equally, with clause of accruer.

In default of children of daughter, then upon the trusts declared of the remaining shares.

In trust (*a*) for all the children of such respective daughter of mine, if there shall be more than one, to take in equal shares as tenants in common for their own respective use and benefit; And in case any one or more of the said children, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, then as to as well the original share or shares of the said trust monies, stocks, funds, or securities belonging to the child or children respectively, who shall so die as aforesaid, as also the share or shares thereof, to which the same child or children respectively may become entitled under this present trust, In trust for the other or others of the said children, and if more than one to take in equal shares as aforesaid, for his, her, or their own absolute use and benefit; or in case there shall be originally only one child of my daughter as aforesaid (*b*), Then in trust for such only child for his or her absolute use and benefit. But in case there shall be no child of such respective daughter of mine, or no such child who shall live to acquire an absolutely vested interest under the trusts hereinbefore contained, Then, as to the said trust monies, stocks, funds, and securities, constituting the share of such respective daughter as aforesaid, Upon trust that my trustees or trustee for the time being shall stand possessed thereof, upon the trusts and for the purposes by this my will declared concerning the other or remaining shares of my said residuary estate, for the benefit of my other children respectively or their issue, so far as the same trusts and purposes shall then happen to be subsisting and capable of taking effect.

(*a*) Here, it will be observed, the daughters have no power of selection, (as in a former precedent, *ante*, 240). Such a power has a salutary tendency in increasing parental influence, and enabling the donee to adapt her disposition of the property to the circumstances existing at the time of its exercise.

(*b*) This precedent exemplifies what does not occur in any previous form, namely, a clause of accruer; for, instead of giving the children as they come into existence immediately vested interests, with a liability to be divested on their dying before the age of distribution, it has been generally preferred, as promoting simplicity and brevity to suspend the vesting until the latter period.

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And the respective shares so accruing to the other or remaining objects of the trusts hereinbefore contained, which shall be then subsisting as aforesaid, shall be subject to all the trusts and declarations in this my will contained (including this present provision) concerning the original shares of such objects respectively, as fully and effectually as if the same were here repeated. And in case none of the trusts declared by this my will concerning the other or remaining shares in favour of my other children or their issue shall be then subsisting, or in case such trusts shall afterwards fail, then the share of such my daughter respectively who shall die without leaving any child who shall acquire an absolutely vested interest as aforesaid, shall be subject to the trusts of this my will, which are subsequent and ulterior to the trust hereinbefore declared in favour of my child and children, and the issue of any deceased child or children as aforesaid. PROVIDED ALWAYS, and I hereby declare, that, in case at the death of such my respective daughter as aforesaid, any of the children of such daughter who shall happen to be entitled, actually or presumptively, to any share or shares in the said trust monies, stocks, funds, or securities, (constituting the share of such daughter as aforesaid), shall, being a son or sons, not have attained the age of twenty-one years, or, being a daughter or daughters, not have attained that age or been married, then it shall be lawful for the trustees or trustee for the time being of this my will, in their or his discretion, from time to time after the decease of such respective daughter as aforesaid, (without prejudice nevertheless to the trust hereinbefore declared concerning one moiety of the said trust premises for my wife during widowhood as aforesaid), to apply all or any part of the yearly dividends, interest, or annual produce of the actual or presumptive share of each such child, being a son, during his minority, or, being a daughter, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; and that so much, if any, of the dividends, interest, or annual produce arising from the share of each such child respectively as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof be added to the principal of the share whence the same shall have arisen, and be

Ultimate trust.

Provision for maintenance as to daughters' shares.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

subject to all the trusts and directions herein contained concerning the same, but the same may afterwards be applied in the discretion of the said trustees for the benefit of such child during his, her, or their minority or discoverture, as the case may be.

Power of advancement.

PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee for the time being during the life of any such daughter of mine as aforesaid, with her consent in writing, and after her decease then in the discretion of the said trustees or trustee (but without prejudice as aforesaid), to apply any part not exceeding one-half of the principal or value of the vested or presumptive share of each or any of the children or issue of each daughter of mine as aforesaid under the trusts hereinbefore contained, or under any appointment to be made as aforesaid in or towards the advancement or preferment in the world, or otherwise for the benefit of the child to whom such share shall actually or presumptively belong.

Power to daughters to bequeath life interests to surviving husbands.

PROVIDED ALSO, and I hereby further declare, that notwithstanding the trusts hereinbefore contained concerning the shares of my said respective daughters, it shall be lawful for any such respective daughter of mine as aforesaid, in case she shall have no child who shall acquire an absolutely vested interest in the share of such daughter in the said trust premises under the trusts hereinbefore contained, by her last will and testament, or any writing in the nature thereof, to appoint unto or IN TRUST for the husband of such daughter respectively, who may happen to survive her, for his own use and benefit, the interest, dividends, and annual produce arising from the share of such daughter respectively in the said trust premises, for any term or period not exceeding the natural life of such husband respectively (*a*).

Power to trustees to invest trust monies in the purchase of lands.

PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that if at any time or times hereafter during the continuance of any or either of the trusts hereinbefore contained, it shall appear to the trustees for the time being of this my will to be expedient to convert any part of the said trust

(*a*) There would, in general, be but little hesitation to give daughters a power of this nature on failure of children; in which respect the present power differs from the one in a former precedent, *ante*, p. 242, where it is made to take precedence of the trust in favour of the children.

money in such purchase or purchases as is or are hereinafter mentioned, it shall be lawful for such trustees or trustee to sell and dispose of any stocks, funds, and securities whereon the said trust money shall be invested under the trusts for that purpose hereinbefore contained, and to lay out and invest the money to arise from the sale or disposition thereof in the purchase of any freehold, copyhold, or leasehold messuages, lands, tenements, or hereditaments, (so that the leaseholds be held for an absolute term, of which not less than seventy years shall be then unexpired, or by lease, containing a covenant to renew for such a term at least); and the same when so purchased shall be conveyed and assured unto and to the use of the said trustees or trustee, their or his heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof respectively, and shall be held by them or him UPON TRUST, at any time or times, in the discretion and of the absolute authority of the said trustees or trustee, to make sale and absolutely dispose of the same messuages, lands, tenements, and hereditaments, either together or in parcels, and either by public auction or private contract, at such price or prices as can be reasonably gotten for the same, and to convey or assign the same when sold to the purchaser or purchasers thereof, or as he, she, or they shall direct, and to receive the purchase money for the same; and, in such discretion as aforesaid, to lay out the money so to be received in the names or name of the said trustees or trustee in or upon the public stocks or funds, or other government securities, or upon any real securities in the United Kingdom, with power to vary and transpose the same as often as shall be found expedient. AND I HEREBY FURTHER DECLARE, that the said trustees or trustee for the time being respectively shall hold as well the said messuages, lands, tenements, and hereditaments, and the rents, issues, and profits thereof, in the meantime, until the sale thereof, as the money to arise from such sale, and the stocks, funds, or securities whereon the same shall be invested, and the yearly interest, dividends, and produce thereof, upon and subject to such of the several trusts, provisions, and directions hereinbefore expressed and contained concerning the said trust money, stocks, funds, and securities, out of the proceeds or produce whereof such purchase or purchases shall be made as aforesaid,

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

Trustees to hold purchased lands upon trusts before declared.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

and the yearly interest, dividends, and produce thereof, as shall be then subsisting or capable of taking effect. And I FURTHER DECLARE, that the messuages, lands, tenements, and hereditaments to be so purchased as aforesaid, shall, from and immediately after such purchase or purchases shall be made, be considered for all the purposes of this my will as personal estate, and be transmitted accordingly, though no actual conversion thereof into money shall have taken place. PROVIDED ALSO, and I further declare, that in case any messuages, lands, tenements, or hereditaments, to be purchased as aforesaid, shall be held by renewable lease or leases for lives or for years, the fines, fees, and expenses of any renewal of the same shall be defrayed out of the rents, and annual profits of the premises comprised in such renewed lease or leases. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, in such discretion as aforesaid, to grant leases of any messuages, lands, tenements, or hereditaments, to be so purchased as aforesaid, for any term not exceeding twenty-one years in possession, at rack rent, without taking any fine, premium, or foregift. And I declare, that the said trustees or trustee for the time being, shall have a like power of granting leases of any other of my messuages, lands, or hereditaments, which for the time being shall form part of my trust estate. AND I HEREBY GIVE AND DEVISE unto the said [*trustees*] and their heirs, all such freehold and copyhold hereditaments as are now vested in me as trustee or mortgagee, subject to the trusts and equities affecting the same respectively, and UPON TRUST to apply the money received by them as mortgagees upon the trusts of this my will. PROVIDED ALSO, and it is my will, that in case the said [*trustees*], or any or either of them, shall die in my lifetime, or shall at my decease renounce the trusts of this my will, or in case the said [*trustees*], or any or either of them, or any trustee or trustees to be appointed under this present provision, shall afterwards die, or become unable or unwilling to act in the trusts of this my will, before the same shall be fully executed and performed, then and in such case, and so often as the same shall happen, it shall be lawful for the surviving or continuing trustees or trustee for the time being under this my will (with the consent of my said wife during her widowhood, and, after her decease or marriage, then and in their or his

Power to lease.

Devise of estates vested in the testator as trustee or mortgagee.

Power of appointing new trustees.

own discretion), or, if there be no surviving or continuing trustee, then for the retiring trustees or trustee, or, if there be no such last-mentioned trustee, then for the executors or administrators of the last deceased trustee (with such consent or in such discretion as aforesaid), to appoint any fit person or persons to supply the place or places of the trustee or trustees so dying, or becoming unable or unwilling to act as aforesaid; and that immediately after every such appointment, the said trust estate, money, and effects, stocks, funds, or securities, shall be conveyed, assigned, and transferred, at the costs and expense of my trust estate, in such manner that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or in such new trustee or trustees solely, as the case may require, subject to the trusts aforesaid; and such new trustee or trustees shall have and may exercise, as well before as after such conveyance and transfer as aforesaid, all the powers and authorities whatsoever hereinbefore contained, in the same manner, to all intents and purposes, as if he or they had been appointed a trustee or trustees by this my will. PROVIDED ALSO, that the said trustees of this my will hereby appointed, and also the trustees to be appointed by virtue of the provision lastly hereinbefore contained, severally and respectively, and their several and respective heirs, executors, and administrators, shall be charged and chargeable with such monies only as they the said trustees respectively shall actually receive, notwithstanding their joining in or signing any receipt or receipts, or doing any other act for the sake of conformity; and that they or any of them shall not be answerable or accountable for any involuntary misfortune, loss, or damage which may happen in the execution of the trusts hereinbefore contained; and especially I declare, that the said trustees or trustee shall not be answerable for the sufficiency of the title of any hereditaments purchased by them under the power in that behalf hereinbefore contained, provided the same shall have been approved by some conveyancing barrister on behalf of such trustees or trustee; and further, that the said trustees or trustee shall have the same discretionary powers in relation to the hereditaments so purchased, when the same shall be sold or offered for sale, by virtue of the trust in that behalf hereinbefore contained, as are hereby given to the said trustees or

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Indemnity to trustees.

PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

trustee in regard to the real estate hereinbefore devised to them, upon trust for sale as aforesaid. PROVIDED ALSO, and I hereby further declare, that all persons paying money to the trustees or trustee for the time being of this my will, shall be exonerated from all responsibility in respect of the application thereof; and further, that it shall be lawful for the said trustees hereinbefore appointed, and such future trustee or trustees to be appointed as aforesaid, severally and respectively, and their several and respective heirs, executors, and administrators, by and out of the money which shall come to their respective hands by virtue of the trusts aforesaid, to deduct, retain, and re-imburse themselves respectively, and also to allow to each other, all costs, charges, damages, and expenses, and fees to counsel for advice, which they or any of them may sustain, disburse, or incur in or about the execution of the aforesaid trusts, or in relation thereto. IN WITNESS, &c.

DISPOSING OF FARM, STOCK, &c.

WILL *of a* FARMER, *bequeathing* STOCK, HOUSEHOLD FURNITURE, *&c. to* TRUSTEES, *Upon Trust to carry on* FARMING BUSINESS *until the* MAJORITY *or* DEATH *of Testator's Son, and then in trust for* SON *absolutely; but, in the event of his dying during Minority, and without leaving Issue,* FARM *to be* SOLD, *and the* PROCEEDS *to fall into the* GENERAL RESIDUE; WIFE *and* SON *to be* MAINTAINED *out of* PROFITS *of* FARM *while Business is carried on, and afterwards Wife to have a* RENT CHARGE *during Widowhood, with* POWERS *of* DISTRESS *and* ENTRY; *another* RENT CHARGE *to* TRUSTEES, *In trust for the* SEPARATE *and* INALIENABLE USE *of a* MARRIED SISTER *of Testator for Life;* PECUNIARY LEGACY, *In trust for a* MARRIED STEP DAUGHTER *for* SEPARATE *and* INALIENABLE USE *for Life, with absolute* TESTAMENTARY POWER *of* APPOINTMENT, *and also with* POWER *to* DIRECT *a certain* SUM *of* MONEY *to be* RAISED *for her*

HUSBAND. *If Farming Business is* DISCONTINUED, STOCK, *&c. to be* SOLD, *and the Proceeds to* FALL *into* RESIDUARY *personal Estate.* RESIDUE *of* PERSONALTY, *in trust for* SON *at* MAJORITY, *or* DEATH LEAVING ISSUE. PROVISION *for his* MAINTENANCE *out of* INCOME *or* CAPITAL *in the meantime. In case of his Death during Minority, and without leaving Issue,* PROCEEDS *of* REAL *and* PERSONAL ESTATE *to be invested, in trust for Testator's three* MARRIED NIECES *equally for* LIFE, *for* SEPARATE *and* INALIENABLE USE. CAPITAL *for their respective* CHILDREN, *with cross Limitations.* POWER *to Trustees, if necessary, to raise, by way of* MORTGAGE, *Money to pay* DEBTS *and* LEGACIES; *and usual discretionary Authority to* DELAY SALE *and* CONVERSION, GIVE INDULGENCES *to* DEBTORS, PAY DEMANDS WITHOUT LEGAL EVIDENCE, SELL UPON CREDIT, *and* REFER DISPUTES *to* ARBITRATION. DEVISE *of* TRUST *and* MORTGAGE ESTATES; POWER *to* APPOINT NEW TRUSTEES *and ordinary* INDEMNITY CLAUSES.

DISPOSING OF FARM, STOCK, &C.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name and addition*]. IN the first place I direct that all my just debts and funeral and testamentary expenses be paid and satisfied as soon as can be after my decease. I GIVE and bequeath unto [*three trustees*], of &c., the sum of £—— sterling, upon the trusts following, viz. UPON TRUST to lay out and invest the same at interest, either in or upon any of the stocks or funds, or other government securities of Great Britain, or upon real securities in England or Wales, and from time to time to vary and change the securities in or upon which the said sum of £—— shall be invested, either as occasion shall require, or as my trustees shall think fit; and I direct that the said sum of £—— shall be paid to or retained by my said trustees as soon as can be after my decease; and that the same shall carry interest at the rate of five pounds *per centum per annum* from the day of my death, and that the interest of the said sum of £——, which shall become due before such investment, shall be

Direction to pay debts, &c.

Pecuniary legacy to trustees.

Trust for investment.

DISPOSING OF FARM, STOCK, &c.

held and applied upon and for the same trusts and purposes as are hereinafter expressed concerning the income of the funds and securities in or upon which the same is hereinbefore directed to be invested. And, as to the said funds and securities, I direct that the trustees or trustee of this my will shall stand and be possessed of the same, UPON TRUST to pay the dividends, interest, and annual produce thereof unto, or otherwise permit the same to be received by, my step-daughter [*name*], wife of ——, for the term of her natural life, for her separate use, free from the control and debts of her present or any future husband, and so that she shall have no power to alien or anticipate the same or any part thereof; and, after the decease of the said [*step daughter*], then do and shall stand and be possessed of the said trust funds and securities, and the dividends, interest, and annual produce thereof, UPON TRUST for such person or persons, and to and for such intents and purposes, and in such manner and form in all respects as she the said [*step-daughter*], by her last will and testament in writing, or any testamentary writing to be by her signed in the presence of and attested by two or more credible witnesses, shall appoint; and, in default of such appointment, and so far as any such appointment, if incomplete, shall not extend, UPON TRUST for the executors or administrators of my said step-daughter [*name*], as part of her personal estate. PROVIDED ALWAYS, and I expressly declare, that, notwithstanding any of the trusts hereinbefore contained, it shall be lawful for the trustees or trustee for the time being of this my will, if directed by the said [*step-daughter*] so to do by some writing under her hand, but not otherwise, to levy and raise, by sale of a competent part of the said trust funds and securities, any sum or sums of money, not exceeding the sum of £—— sterling, and to pay and apply the money so to be levied and raised for the benefit of the present or any future husband of her the said [*step-daughter*], for his own proper use and benefit; but so, nevertheless, that, if the said [*step-daughter*] shall survive her present husband, and shall marry again, she shall be empowered to direct the raising, for the benefit of such future husband, of so much only of the said sum of £—— as shall not have been raised for and paid to her deceased husband or husbands. And I give and bequeath unto my dear wife

Income to be paid to testator's step-daughter for her separate and inalienable use for life; and after her decease,

In trust for such persons as the daughter shall appoint.

Power to the trustees to raise and pay £—— to daughter's husband.

Immediate pe-

[*name*] the sum of £——, and I direct the same to be paid to her within fourteen days after my death. I ALSO give and devise unto her my said wife and her assigns, during so long or such period of her natural life as she shall continue my widow, one annuity or clear yearly sum of £——, of lawful money of Great Britain and Ireland, to be yearly issuing and payable out of and charged and chargeable upon all and singular my messuages or tenements, farms, lands, and hereditaments, situate at —— aforesaid, the said annuity to be payable and paid to her my said wife, or her assigns, in equal quarterly portions in every year, without any deduction or abatement whatsoever, for or in respect of any present or future taxes, or any other matter, cause, or thing whatsoever, with a proportional sum for any fractional portion of a quarter of a year which may happen immediately to precede the determination thereof, the first quarterly payment of the said annuity to be made at the expiration of three calendar months next after the determination of the trusts hereinafter contained for the management and carrying on the business of my said farm; and the said proportional sum to be payable immediately after the decease of the said [*wife*]. AND I DECLARE, that in case and so often as the said annuity of £——, or in case such proportional part thereof as aforesaid, shall be in arrear and unpaid in the whole or in part by the space of fourteen days next after any of the said days or times hereinbefore appointed for the payment thereof as aforesaid, then and so often it shall be lawful for her my said wife, or her assigns, to enter and distrain for the same, and for the expenses occasioned by the nonpayment thereof, upon all or any part of the said hereditaments hereby charged with the payment of the said annuity, in the same manner in all respects as landlords are authorized by law to do for rents reserved on common leases for years; *And also,* that in case and so often as the said annuity, or in case such proportional part thereof as aforesaid, shall be unpaid either in the whole or in part by the space of twenty-eight days next after any or either of the days or times hereinbefore appointed for the payment thereof, then and so often (although there shall not have been any legal demand of the same) it shall be lawful for my said wife, or her assigns, to enter into and upon, and to hold all, or any part of the said hereditaments hereby

DISPOSING OF FARM, STOCK, &c.

Pecuniary legacy to wife.

Rent charge to wife during widowhood.

Power of distress.

Power of entry.

DISPOSING OF FARM, STOCK, &c.

charged as aforesaid, and to retain possession, and to receive the rents and profits thereof for her or their own use, until she or they shall thereby or otherwise be fully paid and satisfied the arrears of the said annuity or yearly rent of £—— which shall be due at the time of such entry, and the arrears of the same which may afterwards become due during the time of her or their being in possession of the said premises, and all costs and expenses occasioned by the nonpayment thereof at the days or times aforesaid. AND I give and bequeath unto my niece [*name*], wife of ——, the sum of £——, to be paid to her within six calendar months next after my decease; *And* I declare that the said sum of £—— shall be for her sole and separate use and benefit, and that her receipt, notwithstanding her present or any future coverture, shall be a valid and effectual discharge for the same. AND I also give and bequeath unto [*trustee*], of (*a*) &c., his heirs and assigns, for and during the natural life of my sister [*name*], one annuity or yearly rent charge of £——, of lawful money aforesaid, to be yearly issuing and payable out of and charged and chargeable upon all and singular the hereditaments hereinbefore mentioned, the said annuity or yearly rent charge to be payable and paid in equal portions quarterly in every year, without any deduction or abatement whatsoever for or in respect of any present or future taxes, or any other matter, cause, or thing whatsoever, with a proportional sum for any fractional portion of a quarter of a year which may happen immediately to precede the determination of the said annuity, the first quarterly payment thereof to be made at the expiration of three calendar months next after my death, and the said proportional sum immediately on the decease of the said [*sister*]; *And* I declare that the legacy duty, payable in respect of the said annuity or yearly rent charge, and all incidental expenses, shall be discharged out of my residuary personal estate (*b*). AND I give to the

Pecuniary legacy to testator's niece for her separate use.

Rent charge to a trustee for life of testator's sister.

Powers of dis-

(*a*) As the general trustees are devisees of the real estates, subject to the rent charges, of course it is necessary to vest the present rent charge in a different trustee.

As to legacy duty payable on annuities.

(*b*) An annuity, payable out of lands and secured by powers of distress and entry, is liable to legacy duty. *Attorney-General* v. *Jackson*, Cr. & J. 101. This impost should always be kept in view in framing gifts by will of annual sums, since the claim of annuitants to be exempt

said [*trustee*], his heirs and assigns, in respect of the said annuity of £——, the same or the like powers of distress and entry upon and perception of the rents and profits of the hereditaments aforesaid, for recovering and enforcing the payment thereof, as I have hereinbefore given to my said wife and her assigns in respect of the said annuity of £——. *And I declare* that the said annuity of £—— shall be held UPON TRUST for and for the sole use and benefit of the said [*sister*], separate and apart from and exclusive of her present or any future husband, and so that the same may not be subject or liable to his debts or control, and so that the said [*sister*] may not assign, incumber, or in any manner anticipate the growing payments thereof; and that her receipts may from time to time, notwithstanding her coverture, be sufficient discharges for the same. *And I declare*, that in case the said annuity or yearly rent charge of 10*l.* shall become, by the act of the said [*sister*], or by any other means whatsoever, vested in or payable to any other person or persons, the same shall immediately thereupon cease (*c*). AND, subject and charged as aforesaid, I give and devise, and, by virtue and in exercise of every power in anywise enabling me in that behalf, appoint unto the said [*trustees*], their heirs and assigns, all and singular my said messuages or tenements, farm, lands and hereditaments, situate, lying, and being in —— aforesaid, or adjoining parishes, and all other the hereditaments, as well freehold as copyhold or leasehold, either in possession, reversion, remainder, or expectancy, in or over which I have any devisable interest or power of appointment, with their and every of their appurtenances, *To*

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tress and entry by way of reference.

Rent charge to be held in trust for separate and inalienable use of testator's sister.

Devise and appointment of real estates (subject to annuities) to trustees.

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from it has been more frequently the subject of dispute than that of any other class of legatees, chiefly because annuities are usually directed to be paid "free from deduction," words which raise the question of exemption. (*Vide ante*, Vol. 8, p. 404). See also *Dawkins* v. *Tatham*, 2 Sim. 492; *Smith* v. *Anderson*, 4 Russ. 352; *Louch* v. *Peters*, 1 Myl. & K. 489; *Stow* v. *Davenport*, 5 Barn. & Adol. 359. This suggestion, however, does not apply to an annuity to the testator's wife, she not being liable to legacy duty, or to a rent charge in fee, which is also exempt, the duty being charged only on annuities "determinable on any life or lives, or for years, *or other period of time*." *Vide* stat. 36 Geo. 3, c. 52, s. 8, *ante*, Vol. 8, p. 374.

(*c*) *Vide ante*, Vol. 9, p. 362, also note, *post*.

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hold the same unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns, upon the trusts hereinafter mentioned. AND I GIVE AND BEQUEATH all my household goods and furniture, plate and plated articles, household linen, books, china, and other household effects whatsoever (including my fowling-piece, and any other articles used by me for personal amusement or recreation), horses, saddles, harness, and other accoutrements, and also all my implements of husbandry, crops of corn and grain (*d*), and live and dead stock whatsoever, which shall be my property, and in or about the messuage, farm, and hereditaments which I shall occupy at my death, unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts hereinafter expressed concerning the same. *And* it is my will, and I direct, that the said hereditaments, effects, and premises respectively hereinbefore devised and bequeathed to my said trustees, shall be held UPON TRUST that they and the survivors and survivor of them, his executors or administrators, and other the trustees or trustee for the time being of this my will, do and shall in the meantime and until my son [*name*] shall attain the age of twenty-one years, or die, which shall first happen, if my said trustees or trustee shall think fit so to do, but not otherwise, either by themselves or himself, or by any other person or persons to be employed by them or him, carry on the business of my said farm, with full power to cultivate and manage the same in such manner as the said trustees or trustee shall think fit, and to sell and dispose of all or any part of the stock and produce of the said farm, and to purchase cattle and other articles to supply the place of the cattle and other articles which shall be sold from time to time as aforesaid, or which shall be necessary to carry on the business of my said farm, with power to increase or diminish the stock thereof, and to employ such bailiffs and other servants and labourers as my said trustees or trustee for the time being shall see occasion, and at such salaries or wages, and other privileges and allowances, and with such powers and authorities, and confidence or trust to be reposed in them or him respectively, as shall be deemed advisable or expedient. *And* it is my will,

Bequest of furniture, stock, &c. to trustees.

Declaration of trusts.

Until testator's son attains twenty-one, or dies under that age without leaving issue, his farming business to be carried on by the trustees.

(*d*) It should seem that crops on the ground will not pass under a bequest of farming stock. *Vaisey* v. *Reynolds*, 5 Russ. 12.

and I desire, that my said wife shall aid and assist my said trustees and trustee in the carrying on and management of the business of the said farm; and that during the time the said farm shall be carried on under the trusts aforesaid, the said messuage or tenement shall be kept at the expense of my trust estate, and for the purpose of providing a residence for my said wife and my said son [*name*]. *And* I further declare, that the profits which shall arise from my said farm during the time the same shall be so carried on as aforesaid, or a competent part thereof, after paying the costs of repairs, and of insuring against fire, and other the charges and expenses to be incurred in the execution of the aforesaid trusts, shall be applied in the maintenance and support of my said wife, and the maintenance, support, and education of my said son, or otherwise for their respective benefit, in such manner and proportions as my said trustees and trustee shall think fit; and that when and as often as there shall be any surplus money in the hands of my said trustees or trustee arising from such profits as shall not be wanted to carry on the business of my said farm, or for other the purposes aforesaid, the same shall fall into and be deemed a part of the residue of my personal estate, and be subject to the trusts and dispositions hereinafter declared of such residue. And subject and without prejudice to the trusts hereinbefore contained, and to the annuities devised to or in trust for my said wife and sister, and the powers and remedies for enforcing the payment thereof respectively, it is my will, and I direct, that my said trustees or trustee for the time being shall stand and be seised and possessed of all and singular the messuages or tenements, farms, lands, and other hereditaments hereinbefore devised and appointed, and of the said household furniture, effects, and premises hereinbefore bequeathed to them, and also of all such crops and live and dead stock and effects as shall be purchased from time to time in lieu or to supply the place of the stock or effects which shall be sold or otherwise disposed of, upon the trusts following, (namely) in case my said son [*name*] shall live to attain the age of twenty-one years, or shall die under that age, leaving lawful issue living at his death, then In trust for him my said son [*name*], his heirs, executors, administrators, and assigns absolutely; but, if my said son shall happen to die under the age of twenty-one years, and without leaving lawful issue living at his death, then I declare that

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Surplus profits to be applied for maintenance of wife, and maintenance and education of testator's son.

Residue to be deemed part of personal estate.

Real estate, (subject to annuities), farming stock, &c., to be held upon the trusts following.

If son should attain twenty-one, or die leaving issue, in trust for him absolutely.

In case of son's death under twenty-one, and without leaving

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my said trustees and trustee for the time being shall stand and be seised of the said lands and other hereditaments so devised to them as aforesaid, upon the trusts hereinafter mentioned, and then also, or if my said trustees or trustee shall think fit not to carry on the business of my said farm, I declare that the said household furniture, plate and plated articles, household linen, books, china, and other household effects (including the articles hereinbefore referred to), and the implements, crops, and other live and dead stock upon or belonging to my said farms, shall fall into and be deemed a part of the residue of my personal estate, and be subject to the trusts hereinafter declared thereof; *And*, with respect to the said messuages or tenements, farms, lands, and hereditaments, it is my will, and I direct, that the same shall be held by my said trustees and trustee, UPON TRUST, as soon as conveniently may be after the decease of my said son under the age of twenty-one years, and without leaving lawful issue as aforesaid, absolutely to sell and dispose of the same and every part thereof, either by public auction or private contract, or partly by public auction and partly by private contract, as the said trustees or trustee shall think fit; and to convey and assure the same, when sold, to the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, and assigns, or as he, she, or they shall direct; And, UPON FURTHER TRUST, that they my said trustees or trustee for the time being do and shall, by and out of the money to arise from such sale or sales as aforesaid, pay the expenses attending the same, and any mortgage debt or debts which may have been created by my trustees under the power in that behalf hereinafter contained, (unless the said hereditaments shall have been sold subject to such mortgage or mortgages); and do and shall lay out and invest the residue or surplus of such monies in or upon any of the public stocks or funds, or other government securities of Great Britain, or upon real securities in England or Wales; and do and shall from time to time vary and change such securities, either as occasion shall require, or as the said trustees or trustee shall think fit; and I declare that the rents and profits of the said hereditaments, after the same shall become saleable, and in the meantime and until such sale shall be made, shall be held upon and for the same or the like trusts,

issue, or if trustees should not carry on farming business, stock, furniture, &c. to fall into residue.

In case of son's so dying, real estate to be sold.

intents, and purposes as are hereinafter expressed concerning the dividends, interest, and annual produce of the funds and securities in or upon which the monies to arise by or from such sale or sales are hereinbefore directed to be invested, and that my said trustees and trustee shall stand and be possessed of the said trust monies, funds, and securities, and the dividends, interest, and annual produce thereof, upon the trusts and for the ends, intents, and purposes hereinafter declared concerning the same. And it is my will, and I expressly direct, that any person or persons who shall pay his, her, or their purchase monies, or any other sum or sums of money whatsoever, to the trustees or trustee for the time being of this my will, shall not be obliged or required to see to the application, or to be answerable or accountable for the misapplication or nonapplication of the same money, or any part thereof; [and that every receipt which shall be given by such trustees or trustee shall be a good, valid, and sufficient acquittance and discharge for the sum or sums of money which therein or thereby respectively shall be acknowledged or expressed to have been received]. PROVIDED ALWAYS, and I hereby direct, that in case my said trustees or trustee for the time being shall at any time after my decease, and during the minority of my said son, deem it expedient to discontinue the business of my said farm, then I declare that it shall be lawful for them or him to relinquish and give up or otherwise to assign over or let my leasehold farm and hereditaments, and to let or grant any lease or leases of my said freehold and copyhold hereditaments, or any part thereof, either from year to year, or for any term or number of years, not exceeding fourteen years in possession, and at the best improved yearly rent that can or may be obtained for the same, and under such covenants and agreements as they or he shall think proper. AND I further declare that the rents and other profits of the said hereditaments shall, during the minority of my said son, be received and taken by my said trustees, and be applied and disposed of in the same manner as is hereinbefore directed concerning the profits to arise from my said farms, in case the same had been carried on as aforesaid. PROVIDED ALWAYS, and I hereby declare, that in case the residue of my personal estate hereinafter bequeathed shall be insufficient for

DISPOSING OF FARM, STOCK, &c.

Purchasers not bound to see to the application of purchase monies.

Power to trustees, in case of their discontinuing the farm business, to assign, lease, and let lands.

Rents of farm to be applied in the same manner as profits.

Power to mortgage real estate, in case of personalty

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being insufficient to pay debts, funeral and testamentary expenses and legacies,

the payment of my just debts (including therein the mortgages upon my real estates), and my funeral and testamentary expenses, and the legacies hereinbefore given, it shall be lawful for the trustees or trustee for the time being of this my will to raise and levy from time to time, by one or more mortgage or mortgages of the freehold and copyhold hereditaments hereinbefore devised and appointed, or any part thereof respectively (such mortgage or mortgages to be made either in fee or for any term or terms of years, and either with or without a power of sale in default of payment), such sum or sums of money as the said trustees or trustee shall think proper to levy and raise for the purpose of paying the said debts, expenses, and legacies, or any of them, or such part or parts thereof as my said residuary personal estate shall be insufficient to satisfy, together with the costs and expenses attending or incident to the raising of the same, and to apply the money so to be raised in payment and satisfaction thereof accordingly. *And* I expressly direct and declare, that the person or persons who shall advance any sum or sums of money upon the security of any mortgage or mortgages of the hereditaments aforesaid, or of any part thereof, shall not be obliged or required to see to the application, or to be answerable or accountable for the misapplication or non-application of the same money, or of any part of the same, or to ascertain or inquire whether such mortgage or mortgages is or are necessary or proper for the purposes aforesaid, or any of them, or into the sufficiency or insufficiency of my personal estate for the payment of the same, [it being my intention that such mortgage or mortgages shall be left absolutely to the discretion of my said trustees or trustee for the time being; and that their or his receipts shall, to all intents, effects, and purposes, be good and sufficient discharges for the money which therein or thereby respectively shall be acknowledged or expressed to be or to have been received.] PROVIDED ALWAYS, that in case the annuities so hereinbefore made payable out of my freehold, copyhold, and leasehold hereditaments, or either of them, shall be subsisting when the hereditaments charged therewith shall become saleable under the trusts aforesaid, such hereditaments shall or may be sold either subject to or free and discharged from the said annuities or annuity, as the trustees or trustee for the time

Mortgagee not to be bound to see to the application of mortgage money,

or to ascertain the propriety of any mortgage.

Special provision in case estates should be sold while annuities are subsisting.

being of this my will shall think proper; and in case the said hereditaments shall be sold free and discharged therefrom, the said annuities or annuity respectively, and the powers and remedies hereinbefore reserved for enforcing the payment thereof, shall, immediately on the execution of the conveyance and assurance of the said hereditaments, or otherwise, according to the tenor and effect thereof, cease to be payable out of and charged upon or in any manner to affect the said hereditaments; and the same annuities or annuity shall from time to time thenceforth be charged upon and payable out of the dividends, interest, and annual produce arising from the securities upon which the proceeds of such sale shall be invested; or, in the option of the person or persons beneficially entitled to such annuities or annuity respectively, a separate and distinct investment shall be made, on government or real security as aforesaid, of an adequate portion of the monies arising from such sale or sales, for the purpose of securing the same annuities or annuity in the joint names of the trustees or trustee for the time being of this my will, and of some person to be nominated by such annuitant, or, if more than one annuity shall be then subsisting, then of two persons, one to be nominated by each annuitant, UPON TRUST, in the first place, out of the annual income of such invested fund, to pay the said annuities or annuity, and, when and as the same respectively shall determine, UPON TRUST, to transfer the said funds and securities to the trustees or trustee for the time being of this my will, upon the trusts and for the intents and purposes hereinbefore expressed concerning the same. But I expressly direct and declare, that it shall not be incumbent on any person or persons who may happen to purchase the said hereditaments, or any part thereof, discharged from the said annuities or annuity, to see that any such investment or investments as last aforesaid is or are made. And I further declare, that in case my trustees shall, under the power in that behalf hereinbefore contained, make any mortgage or mortgages of my said real estate, the mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, shall and may hold the said hereditaments free and discharged of and from the said annuities hereby charged thereon; provided nevertheless, that as between the persons claiming the said real

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Provision in regard to annuities, in case they are subsisting when mortgage is created.

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estate under this my will, the said annuities or annuity shall be and be deemed to be a subsisting and continuing charge thereon. And I further declare, that this present provision shall apply, although such mortgage or mortgages shall be created for the purpose of paying any of the pecuniary legacies hereby bequeathed, it being my intention that such legatees shall take precedence of the annuitants in regard to their several claims upon the said estates (*e*). PROVIDED ALWAYS, and I hereby empower the trustees or trustee for the time being of this my will, in the exercise of the trust for sale hereinbefore contained, to buy in any part of my trust estate which shall or may be offered for sale by auction, and also in their or his discretion to rescind or vary any contract concerning the same, and also to make and enter into special stipulations relative to title, or the mode of paying the purchase money, or otherwise; and further, that, if the said trustees or trustee shall deem it disadvantageous or inexpedient to proceed to sell and convert my trust estate at the time or times hereinbefore prescribed or mentioned for the sale and conversion thereof, it shall be lawful for the said trustees or trustee to suspend such sale and conversion, in respect of the whole or any part of such estate, so long as they or he shall think proper; nevertheless, I declare that the same shall be absolutely impressed with the qualities of personal estate for the purposes of transmission, at the period when the same shall become saleable or convertible under the trusts aforesaid (*f*). And I further empower my executors and trustees to relinquish, delay, or suspend, either wholly or in part, and either absolutely or conditionally, the enforcement of any claim or demand at law or in equity against any person or persons whatsoever, and also, if deemed expedient to pay any sum or sums of money which shall be claimed to be owing

Power to trustees to buy in property offered for sale at auction, &c.

To suspend enforcement of claims, &c.

(*e*) All these points require an explicit statement in order to prevent dispute.

(*f*) It is clear that real estate, absolutely directed to be sold, is transmissible, from the prescribed period of conversion, as personal estate; but where a discretion is vested in trustees to suspend or delay the conversion, it may be a question whether the character of personalty is, during the suspension, impressed on it: to exclude any such question the present clause is added.

by me upon such evidence, whether strictly legal or not, as such executors or trustees shall deem satisfactory; and also to adjust and wind up any accounts pending between me and any other person or persons whomsoever, and give full and complete acquittances and discharges in relation thereto; and to refer to arbitration any disputes which may arise with any person or persons with whom I in my lifetime, or the said trustees after my decease, shall have had any dealings or transactions. And I further empower my executors and trustees, in the exercise of the trust for sale hereinbefore contained, or in the course of their management and carrying on of the business of the said farm as aforesaid, to sell any part of the stock or trust property upon credit. And I declare, that my trustees for the time being, or any or either of them, shall be competent to purchase any part of my trust estate, either by public auction or private contract, any rule of equity to the contrary notwithstanding(*g*). And I declare, with respect to the application of income to the maintenance and education of any minor or minors who may be actually or presumptively entitled to any share or shares in the said trust funds and premises, that it shall be lawful for my trustees, either themselves to apply the same, or, in their discretion, to pay such money to the guardian or guardians of such minor or minors, for the purpose of being so applied, without incurring any responsibility in regard to the application of the monies so paid; nor shall it be incumbent on my trustees to ascertain whether the father, if any, of such minor, is of ability to maintain him or her, or whether there is any other fund applicable to such purpose. And I declare, that I have enlarged the discretion of my executors and trustees in the several particulars aforesaid, under the conviction that their exemption from legal responsibility in relation thereto will not abate, but will tend rather to increase their care and diligence in the administration of the trust affairs. AND I GIVE AND BEQUEATH, and in pursuance and by virtue of any power or powers enabling me in that behalf, appoint unto the said [*trustees*], their executors, administrators, and assigns, all the rest, residue, and remainder of the personal estate and effects whatsoever and wheresoever to which I

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to sell upon credit,

—to purchase any part of trust estate,

—to pay maintenance fund to guardians of minors.

Bequest and appointment of residue of personal estate, upon trust for sale and conversion.

(*g*) *Vide ante*, Vol. 5, p. 329.

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shall be entitled at the time of my decease, not hereinbefore specifically or otherwise bequeathed or disposed of, and also all the personal estate over which I now have a power of appointment, UPON TRUST, as soon as conveniently may be after my decease, to collect, get in, and receive the credits and sums of money, and to sell and dispose of and convert into money such parts of the said personal estate as shall not consist of money (including the furniture, stock, and other effects aforesaid, in case the same shall fall into the aforesaid residue under the trusts and directions hereinbefore contained). AND, UPON FURTHER TRUST, by and out of the monies to be collected and received as aforesaid, to pay and discharge all my just debts and funeral and testamentary expenses, and the legacies hereinbefore bequeathed, and to lay out and invest the residue of the said trust monies, or such part thereof as my said trustees or trustee shall not think necessary to apply in carrying on the business of my said farm, together with the surplus profits, if any, of the same farm, which shall not be applied for the like purpose, in or upon such funds or securities as hereinbefore mentioned, and to vary and change the said funds or securities from time to time, as the said trustees or trustee shall think fit. AND I DECLARE, that my said trustees or trustee shall stand and be possessed of the said last-mentioned trust money, funds, and securities, and the dividends, interest, and annual produce thereof, IN TRUST, in case my said son [*name*] shall live to attain the age of twenty-one years, or shall die under that age, leaving lawful issue living at his death, for him my said son, his executors, administrators, and assigns absolutely. AND I DECLARE, that it shall be lawful for my said trustees or trustee for the time being to apply as well the dividends, interest, and annual produce, as also any part of the capital of the funds and securities, upon which the produce of my residuary personal estate shall, for the time being, be invested, or so much thereof as the said trustees or trustee shall deem sufficient, in, for, or towards the maintenance, education, and advancement, or otherwise, for the benefit of my said son during his minority, in such manner as my said trustees or trustee shall think fit; and the surplus or residue thereof unapplied to the purposes aforesaid shall, from time to time, be invested by the said trustees or trustee in augmentation of the capital of the said trust funds, and shall

Out of proceeds to pay debts, expenses, and legacies, and invest residue;

In trust for son on his attaining twenty-one, or dying without leaving issue.

Provision for maintenance of son during minority out of income or capital of residue.

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follow the destination thereof. BUT, if my said son shall happen to die under the age of twenty-one years, without leaving lawful issue living at his death, then I declare, that my said trustees or trustee for the time being shall stand and be possessed, as well of the said last-mentioned trust monies, funds, and securities, as also of the funds and securities in or upon which the monies to arise from the sale of the said farm and other hereditaments hereinbefore devised and appointed are hereinbefore directed to be invested, upon the trusts following, that is to say, As to one equal fourth part thereof, IN TRUST for my said wife, her executors, administrators, or assigns; and as to the remaining three equal fourth parts thereof, UPON TRUST, from time to time, to pay the dividends, interest, and annual produce arising therefrom unto my nieces [*three married nieces*], in equal shares and proportions, the share of each of my said nieces to continue during her respective natural life, and to be for her sole use and benefit, separate and apart from and exclusive of her respective present or any future husband; And so that the same respective share, or any part thereof, may not be subject or liable to his debts or control; And also so that such niece may not assign, incumber, or in any manner anticipate, the growing payments thereof (*h*); And that the respective receipts of each of my said nieces may from time to time, notwithstanding coverture, be good and sufficient discharges for the dividends, interest, and income, which therein or thereby respectively shall be expressed to have been received. AND, on the death of each respectively of them the said [*nieces*], I direct that the share of the said trust monies, funds, and securities, in which such niece had a life interest, shall be held IN TRUST for her respective child or children, to be equally divided between or among such children, if more than one, share and share alike; the share of each child, being a son, to be vested in and payable to him at his age of twenty-one years, or, being a daughter, at her age of twenty-one years or day of marriage, which shall first happen; and, in the meantime, the income arising from the expectant or presumptive share of such child to be applied for his or her maintenance and education, in such manner as the

In case of son's death under twenty-one, and without issue, trust premises to be held upon trusts following:

As to one fourth for wife absolutely, remaining three fourths for testator's three nieces for their separate use for life, without power of anticipation.

After the decease of nieces, in trust for their respective children.

(*h*) *Vide ante*, Vol. 9, p. 362; also *post*.

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said trustees or trustee shall think proper. AND, in case any or either of them the said [*nieces*] shall die without having had any child, or in case the child, if only one, or both or all the children, if more than one, of any one or more of them shall die in my lifetime; or, being a son or sons, shall afterwards die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age and without having been married, then the share of each or either of them the said [*nieces*] so dying, or of whose issue there shall be such failure as aforesaid, and also any additional share or shares which she or they shall or may from time to time have derived under this present limitation, shall be held on the same trusts, and with the same limitations over, as are hereby declared of the original share or shares of the other or others of them the said [*nieces*], and by way or in the nature of cross remainders. And if there shall not be any such child, or if the child, if only one, or both or all the children, if more than one, of them the said [*nieces*] shall die in my lifetime, or, being a son or sons, shall afterwards die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age and without having been married, then IN TRUST for such one of them the said [*nieces*] as shall have survived and outlived the other of them, and the executors, administrators, and assigns of such survivor. PROVIDED ALWAYS, and I hereby declare, that the provision hereby made for the said [*name*], my wife, is so made and shall be accepted by her in lieu, bar, and full satisfaction of all dower, right, and title of dower, thirds and freebench, and other customary estate whatsoever. AND I GIVE AND DEVISE unto the said [*trustees*], their heirs and assigns, all such real estates as are vested in me as mortgagee or trustee, upon the trusts and for the ends, intents, and purposes, for which the same respectively are held by me; but so, nevertheless, that any beneficial interest belonging to me as mortgagee in the said devised estates shall be subject to the trusts hereinbefore declared concerning my residuary personal estate. AND I APPOINT the said [*trustees*] executors of this my will, and I appoint my said wife during her widowhood, and, after her decease or second marriage, the said [*trustees*], and the survivors and survivor of them, guardians and guardian of the person, estate, and fortune,

Clause of accruer.

On total failure of objects, in trust for survivor.

Provision for wife to be in lieu of dower.

Devise of mortgage and trust estates.

Appointment of executors and guardians.

of my said son during his minority. PROVIDED ALWAYS, and I hereby further declare, that in case the said [*trustees*], or any or either of them, shall die in my lifetime, or shall at my decease renounce or be incapable of acting in the trusts of this my will, or in case, at any time or times thereafter, any trustee or trustees for the time being shall die, or desire to be discharged of and from the aforesaid trusts, or shall neglect or refuse, or become incapable, to act in the said trusts before the same shall be fully executed and performed, then and in every such case, and so often as the same shall happen, it shall be lawful for the acting trustee or trustees for the time being, or, if there shall be no such trustee, then for the renouncing or retiring trustee or trustees, and, if there shall be no such trustee as last aforesaid, or he or they shall decline to exercise this present power, then for the executors or administrators of the last acting trustee, to nominate and appoint any person or persons to supply the place of the trustee or trustees respectively so dying, renouncing, desiring to be discharged, or refusing or neglecting, or becoming incapable to act as aforesaid; and that, immediately after every such appointment, the trust estate, funds, and securities, which shall be then vested, under and by virtue of this my will, in the trustee or trustees respectively so dying, renouncing, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid, shall be conveyed, assigned, and transferred, at the costs of my trust estate, so and in such manner that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustee, or solely, as the case may require, and in his, her, or their heirs, executors, administrators, and assigns, upon such of the trusts hereinbefore expressed concerning the same as shall be then subsisting or capable of taking effect; AND, that every such new trustee, as well before as after the execution of such conveyance, assignment, and transfer, shall have and may exercise the same powers, privileges, and authorities whatsoever, as if he had been appointed a trustee by this my will, and as if his name had been inserted therein instead of the name of the trustee hereby appointed, in or to whose place such new trustee or trustees respectively shall come or succeed. PROVIDED ALSO, and I further declare, that the power lastly hereinbefore con-

DISPOSING OF FARM, STOCK, &c.

Power to appoint new trustees.

Special power of new appoint-

DISPOSING OF FARM, STOCK, &c.

ment in regard to rent charge.

tained is not intended to apply to the trusteeship hereby constituted in respect of the said yearly rent charge of £——, hereinbefore devised; but that when and so often as a vacancy shall occur therein by any of the means mentioned in the power lastly hereinbefore contained, a new trustee or trustees shall be forthwith appointed by the said [*sister*], and the said rent charge shall thereupon, at the costs and expense of the said [*sister*], be granted and assured to such trustee or trustees accordingly. AND I HEREBY DECLARE, that every trustee for the time being of this my will shall be charged and chargeable only for such money as such trustee shall actually receive by virtue of the trusts hereby in him reposed, notwithstanding his signing or joining in any receipt or receipts for the sake of conformity, and that any one or more of the said trustees shall not be answerable or accountable for the other or others of them, or any or either of them for the acts, receipts, neglects, or defaults of the other or others of them, nor for any involuntary loss whatsoever. AND that it shall be lawful for every trustee, out of the monies which shall come to his respective hands by virtue of the trusts aforesaid, to retain and also to allow to his co-trustee and co-trustees all costs and expenses which he or they shall incur or expend in or about the execution of the aforesaid trusts, or in relation thereunto. AND, LASTLY, I hereby revoke all former and other wills and testamentary dispositions made by me at any time heretofore, and declare this alone to be my last will and testament. IN WITNESS, &c.

Indemnities to trustees.

Revocation of former wills.

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

WILL *of* REAL *and* PERSONAL ESTATE. *Bequest of* HOUSEHOLD FURNITURE, *&c. between two of Testator's* DAUGHTERS, *with Power to* EXECUTORS *to adjust* DISPUTES *respecting the Division.* DEVISE *of certain specified* FREEHOLD ESTATES, *In trust for* TESTATOR'S TWO SONS *for their respective* LIVES, *with (equitable)* REMAINDER *in* FEE *to such of their respective* CHILDREN *as shall attain Majority, or die leaving Issue. Similar* DEVISE *of another* FREEHOLD ESTATE,

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

In trust for Testator's two DAUGHTERS *for their separate inalienable Use, with Remainder to their respective* CHILDREN *and* ISSUE. LIMITATIONS OVER *of the respective* ESTATES, *in the Nature of* CROSS REMAINDERS. DEVISE *in fee (with a* POWER *of* APPOINTMENT) *of another Estate to a* GRANDSON. PROCEEDS *of* RESIDUARY PERSONALTY *to Testator's* SURVIVING CHILDREN, *and the* ISSUE *of* DECEASED CHILDREN *per* STIRPES *absolutely. Short* POWERS *to Trustees to apply* INCOME *for* MAINTENANCE *during* MINORITY; *also to* LEASE *Lands,* COMPOUND DEBTS, *&c. Devise of* TRUST *and* MORTGAGE ESTATES. *Power to* APPOINT NEW TRUSTEES. *(A concise Form.)*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. First, I appoint [*names*], executors of this my will. I GIVE to my elder son [*name*] my gold watch, with the chain, seals, and appendages thereto, or any other watch, chain, seals, and appendages, which I may use in lieu thereof at the time of my decease. I GIVE to my younger son [*name*] my horse and chaise, with the harness and other accoutrements belonging thereto, and any other horses and other animals, chaises and other vehicles, harness, and accoutrements, of which I shall or may be possessed at the time of my decease. I GIVE to my two daughters [*names*], all the wearing apparel, household furniture, plate and plated articles, linen, china, printed books, and household effects, of which I shall be possessed at my decease, equally to be divided between them, share and share alike, for their own absolute use and benefit; and if any dispute shall arise respecting the distribution thereof, then I empower my executors, in their discretion, to distribute and apportion the said furniture and effects between my said daughters, in such manner as such executors shall think fair and proper. I GIVE AND DEVISE all that and those my farm and hereditaments, situate in the parish of ——, in the county of —— (*a*), unto and to

Appointment of executors.

Bequest of watch, &c.

Bequest of household furniture.

Devise of farm, in trust for testator's three sons for life, with

(*a*) Disputes are often occasioned by obscurities respecting the local extent and boundaries of devised lands; this not unfrequently occurs from the testator having, in several instances, applied to the subject of

Advantage of precision in regard to local limits.

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

the use of my said executors and their heirs for ever, UPON TRUST from time to time to pay the rents and profits thereof unto and equally among my sons [*three names*], as tenants in common for their respective lives, and after their respective deceases, then UPON TRUST for such of the children of my said three sons respectively as have already attained, or shall hereafter attain, the age or respective ages of twenty-one years, or shall die under that age, leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their heirs and assigns for ever, if more than one, as tenants in common; but so, nevertheless, that the respective child or children of each of my said three sons shall have his, her, or their parents' share or respective parents' shares only (*b*).

remainder to their children attaining twenty-one, or dying leaving issue.

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devise terms of description of unequal extent, raising the question, therefore, whether the less comprehensive term is restrictive: for instance, a testator gives his farm in the parish of A, in the occupation of B, or his farm called Blackacre, in the occupation of B, and it turns out, that though the chief part of the testator's farm in the parish of A, or called Blackacre, is in the occupation of B, yet a small portion is occupied by some other person; whether such portion passes is the question. The cases on this point are not easily reconciled; but the inclination of modern judges is to treat the reference to occupancy, the narrower particular, as a mere redundance of description, and not as restrictive. See *Goodtitle* v. *Southern*, 1 Mau. & Selw. 299; *Down* v. *Down*, 1 J. B. Moore, 80; S. C. 7 Taunt. 343 (which compare with *Doe* v. *Parkin*, 5 Taunt. 321). See also *Doe* v. *Gillard*, 5 Barn. & Ald. 785. The hint which such cases suggest is, not to incumber a description with particulars not requisite for the purpose of distinction; and they enforce the more general recommendation, that a person taking instructions for or preparing a will, should acquire the fullest information respecting the devised estates, in regard to locality, names, extent of tenants' holdings, &c.

Remark on the scheme of disposition exemplified in the text.

(*b*) It will be observed, that the share of a son dying during minority, leaving issue, does not go to such issue, but vests absolutely in the father, from whom it would in all probability descend to the surviving issue, or one of them, if consisting of more than a single individual.

In such gifts as the present, it is more simple and concise to vest the legal inheritance in trustees, giving the intended beneficiaries *equitable* interests only, than to attempt to carve out the legal inheritance among the latter, which would render it necessary to interpose a vested particular estate in remainder between the prior estate for life and the contingent remainder expectant thereon, in order to preserve such remainder from

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

And if any or either of my said three sons shall die without having any child who shall survive me and shall attain the age of twenty-one years, or die under that age, leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon such and the same trusts as are hereby limited and declared concerning the other or remaining undivided share or respective shares of the said hereditaments, or such of the same trusts as shall be then subsisting or capable of taking effect. PROVIDED NEVERTHELESS, that in case [*name*] the present wife of my said son [*name*] shall survive him, then UPON FURTHER TRUST, immediately after his decease (whether he shall leave children or not), out of his third or other share of the said trust premises, to pay to the said [*wife*] an annuity of £—— during her life, in equal half-yearly portions, to commence from the decease of my said son, with a proportional sum up to the time of her decease. I GIVE AND BEQUEATH all that my leasehold messuage, situate at ——, in the occupation of ——, unto my said executors, their executors and administrators, for all the term and estate therein of which I shall be possessed at the time of my decease, UPON TRUST to pay the rents and profits thereof unto my son [*name*], or permit him to receive the same during his life, and after his decease, IN TRUST for all and every the child and children of the said [*name*], who shall attain the age or respective ages of twenty-one years, or shall die under that age, leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their executors, administrators, and assigns, if more than one, as tenants in common. AND in case my said son [*name*] shall die without having any child who shall survive me and shall attain the age of twenty-one years, or die under that age, leaving lawful issue living at his or her decease, then I give and dispose of the said leasehold premises, so far as the different nature of the tenure will permit, upon such and the same trusts as are hereby limited and declared concerning the freehold hereditaments at —— hereinbefore devised, or such of them as shall be then subsisting or capable of taking

Bequest of leaseholds, in trust for son for life, and after his decease, for his children attaining twenty-one, or dying leaving issue.

And in default of children, upon the trusts before declared of a certain freehold estate. Devise to trustees in fee, in trust for testator's two daughters for life.

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destruction; and it would also be proper to vest in the trustees an express power to enter and receive the rents during the minority of any of the beneficiaries.

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

Devise to trustees in fee, in trust for testator's two daughters for life, for their separate and inalienable use; and after their decease, in trust for their children attaining twenty-one, or dying leaving issue.

effect. I GIVE AND DEVISE all those two messuages at ——, in the occupation of —— and ——, unto and to the use of my said executors, their heirs and assigns for ever, UPON TRUST to pay the rents and profits thereof unto my daughters, [*name*], the wife of [*husband*], and [*name*], the wife of [*husband*], in equal shares, as tenants in common during their respective lives, for their separate use, free from the control and debts of their present and any future husbands; and so that my said daughters respectively shall have no power to anticipate the same. And after the decease of my said daughters respectively, IN TRUST for such of the children of my said two daughters respectively (except my grandson [*name*], for whom I have hereinafter otherwise provided), as have attained or shall hereafter attain the age or respective ages of twenty-one years, or shall die under that age, leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their heirs and assigns for ever, if more than one, as tenants in common; but so, nevertheless, that the child or children of each daughter shall take his, her, or their own parents' share only (*c*). I GIVE AND DEVISE all those two tenements, situate at ——, in the several occupations of —— and ——, to the uses following, to such uses, and for such estates and purposes, as my said grandson [*grandchild before excepted*], the eldest son of my said daughter [*name*], shall, by deed or will duly executed, appoint, and, in default of such appointment, to the use of my said grandson [*name*], his heirs and assigns for ever. PROVIDED ALWAYS, and I hereby declare, that in case my said grandson shall, at the time of my decease, be under the age of twenty-one years, it shall be lawful for my said executors to enter upon the said hereditaments hereinbefore devised to him, and receive the rents arising therefrom during the minority of my said grandson, and apply the same for the maintenance and education of the said [*grandson*], or, in the discretion of the executors, pay the said rents to the parent or guardian, or either of the parents or guardians for the time being of my said grandson, to be so applied, without any responsibility on the part of my said

Devise to such uses as grandson shall appoint, and in default, to him in fee.

Power to trustees to enter and apply rents for maintenance during minority.

(*c*) Each daughter having several children, it was deemed unnecessary to add cross limitations, as in the former devise.

executors to see to the application thereof, and without regard to the competence or ability of the parents or parent, if any, of my said grandson, to provide such maintenance and education as aforesaid. And I empower my executors during the minority of the said [*grandson*] to let the said hereditaments from year to year, or for any term not exceeding twenty-one years in possession, at rack rent. AND I GIVE AND BEQUEATH all my ready money, securities for money, and all other my personal estate and effects whatsoever and wheresoever, not hereinbefore specifically or otherwise disposed of, and also all the personalty over which I have any disposing power, unto the said [*executors*], their executors, administrators, and assigns, UPON TRUST, with all convenient speed after my decease, to sell and dispose of, collect, get in, and convert into money, the said residuary personal estate, and thereout to pay my just debts and funeral expenses, and the expenses of proving this my will; and also a legacy of £——, to [*nephew*], son of my late brother [*name*], and after such payments, to divide or retain (*d*) the residue or surplus of such money or residuary personal estate, unto and equally among my said sons and daughters the said [*names*], or such of them as shall be living at the time of my decease, and the issue then living, and who shall attain the age of twenty-one years, of any of my said children who may have died in my lifetime; such issue to take only the share or respective shares which his, her, or their parent or respective parents, if living, would have been entitled to. And in case any of such issue shall be under the age of twenty-one years at the time of my decease, then I direct my said trustees for the time being to invest the expectant or presumptive share or respective shares of such issue in government or real securities, in their own names, from time to time, varying the same securities as they shall think fit. AND I EMPOWER and direct my trustees for the time being to apply the rents and annual produce arising from the respective shares or properties, or expectant shares or properties, to which any grandchildren of mine shall be actually or presumptively entitled in possession, or to which they would, if of full age, be entitled under the trusts aforesaid, to and for the maintenance and education of such grandchildren respectively, or, in the

REALTY, &c. IN TRUST FOR CHILDREN AND GRANDCHILDREN.

Residuary bequest to trustees, upon trust to convert and divide the proceeds among surviving children.

Power to invest share of issue during minority.

Power to trustees to apply income for maintenance during minority.

(*d*) A son of the testator was one of his executors.

REALTY, &c. IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

discretion of the said trustees, to pay the said rents and annual produce, or such part thereof as they shall deem adequate for the purpose, to the surviving parent or other guardian of such grandchildren, to be so applied during their respective minorities. And I declare, that the unapplied part of the said rents and annual produce (if any) shall follow the destination of the shares or properties from whence the same respectively shall have arisen. And I direct that my trustees shall not be responsible for the due application of any monies which they shall so as aforesaid pay to the surviving parent or guardian of any grandchild of mine, nor shall be bound to inquire into the ability of the father, if any, of such respective grandchild to provide for his or her maintenance and education.

Power to trustees to lease,

I ALSO EMPOWER my trustees for the time being, with the consent in writing of the persons for the time being entitled to the rents and profits of the hereditaments next hereinafter mentioned, or such of the persons so entitled as shall be of the age of twenty-one years, and if there shall be no such person, then of the proper authority of the said trustees, to demise the said hereditaments hereinbefore devised and bequeathed in trust as aforesaid, or any part thereof respectively from year to year, or for any term not exceeding twenty-one years in possession, at rack rent.

—compound debts, pay claims unsupported by legal evidence, and refer disputes to arbitration.

And I empower my executors to compound for any claims or demands which they may have upon or against any person whomsoever, and also to pay any sum or sums of money which shall be claimed to be owing from my estate, upon such evidence, though not strictly legal, as they shall deem sufficient and satisfactory. And also to refer any dispute with any debtor or creditor of my estate to arbitration, and to give full and ample discharges to any person or persons with whom I in my lifetime, or the said executors after my decease, shall have had any accounts, dealings, or transactions whatsoever.

Devise of trust and mortgage estates.

I GIVE AND DEVISE unto my said executors and their heirs all the lands and hereditaments vested in me as trustee or mortgagee; *To hold* the same unto and to the use of them the said executors, their heirs and assigns, upon and subject to the several trusts and equities for the time being affecting the same hereditaments respectively.

Power to appoint new trustees.

AND I DECLARE, that when and so often as any vacancy shall occur in the office of trustee under this my will, by reason of the death (whether in my lifetime or after my decease), renunciation, incapacity,

or resignation of any trustee for the time being, it shall be lawful for the surviving or continuing trustee or trustees for the time being, or, if there be no such trustee, then for the executors or administrators of the last deceased trustee, or, if there be no such last-mentioned person, then for the renouncing or retiring trustee or trustees, to nominate a new trustee or trustees to supply such vacancy or vacancies respectively. And I hereby declare, that my said executors and trustees for the time being shall not be answerable for each other, or for involuntary losses, and that they shall be allowed and may retain all their costs and expenses to be incurred in the due execution of the trusts hereby in them reposed; and that every person paying money to such executors and trustees shall be exonerated from all responsibility in respect of the application thereof. And I hereby revoke all former wills. In witness, &c.

REALTY, &c. IN TRUST FOR CHILDREN AND GRANDCHILDREN.

Indemnity to trustees.

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

WILL *of* Personalty (*except as including Trust and Mortgage Estates*) *simply bequeathing* Residue *to Testator's* Wife *absolutely, after raising a* Stock Legacy, *which is vested in Trustees, in trust for Testator's only* [*married*] Daughter *for her* separate *and* inalienable *Use during the* joint Lives *of* Daughter *and her* Husband, *and then for the* Survivor for Life; *on the Decease of Survivor, the* Capital *in trust for Daughter's* Children. *Usual Powers of* Maintenance, Advancement, varying Securities, giving Discharges, *and* appointing *new* Trustees. *(A short Form.)*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I appoint my wife and my friends [*two names*], of &c., to be executrix and executors in trust of this my will. I give and bequeath to the said [*executors*] the sum of nineteen pounds and nineteen shillings each, in consideration of their undertaking the trusts of this my will,

Appointment of executors.

Legacy to executors for trouble.

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

to be retained by them as soon as convenient after my decease. I GIVE AND BEQUEATH to the said [*executrix and executors*], £—— Three Pounds per centum Consolidated Annuities, to be retained, appropriated, or purchased by them out of my personal estate within three calendar months after my decease (*a*), and to be held upon the trusts herein-

Legacy of £—— 3 per cent. Consols to trustees.

Rules as to payment of legacies, and their carrying interest.

(*a*) The payment of general pecuniary legacies cannot be enforced until the lapse of a year from the testator's decease, though the executor may, if he think proper, pay them at an earlier period, and, it is conceived, ought to do so, if the adequacy of the estate to the payment of the legacies is unquestionable. The time of payment is not varied by a mere direction to pay as soon as convenient.

The general doctrine is, that legacies carry interest only from the period when they become payable, and one of the purposes for which payment is directed to be made at an early period (commonly three or six months) after the testator's decease usually is to accelerate the legatee's claim to interest, though of course a legacy may, by express declaration, be made to carry interest before the time of payment. The rule which postpones a legatee's title to interest until the end of a year, or any other prescribed period of payment, admits of an exception in regard to legacies bequeathed by way of portion by a parent to an infant child, who may in general claim interest from the day of the testator's decease as a fund for maintenance. Even in other cases, however, it is often found convenient to fix an earlier time of payment than is prescribed by the general rule, as the delay of a year presses rather hardly upon a legatee, whose income is to be derived principally or solely from the bequeathed fund. This is especially felt where the legacy is directed to be invested in trust for a person for life; the legacy is not payable to, or rather is not demandable by, the trustee until the end of a year, and if at that time the half-yearly dividend (assuming the investment to be made in stock) had just accrued, the *cestui que trust* for life would have to wait for nearly six months longer before another dividend would be receivable; so that there would be an aggregate interval of nearly eighteen months between the death of the testator and the legatee's actual usufructuary enjoyment.* Hence the expediency in such cases of accelerating the period of payment, or (which would be preferable where early payment might be inconvenient to the estate) of making the legacy carry interest from the period of the testator's decease, or from some early day afterwards.

General stock legacies.

The preceding remarks, in reference to pecuniary legacies, apply with

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* But the current dividend, in the event of the death of the *cestui que trust* for life, would now be apportioned under the stat. 4 & 5 Will. 4, c. 22, *ante*, Vol. 9, p. 576.

after declared concerning the same. And I direct that the legacy duty payable on the said sum of £—— Three Pounds per centum Consolidated Annuities hereinbefore bequeathed shall be paid out of my residuary personal estate. AND, as to all the residue and remainder of the personal estate and effects whatsoever and wheresoever, of which I shall be possessed at the time of my decease, or over which I now have any disposing power, I give, bequeath, and appoint the same and every part thereof unto my said wife for her own absolute use and benefit; and I devise to my said wife and her heirs all the real estates vested in me as mortgagee or trustee, subject to the equities and trusts which at the time of my decease may happen to affect the same respectively. AND I DIRECT AND DECLARE, that the said [*trustees*] and the survivors and survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, do and shall stand possessed of the said £—— Three Pounds per centum Consolidated Annuities hereinbefore bequeathed, UPON TRUST, from time to time during the joint lives of my daughter [*name*], wife of &c., and the said [*name*], her husband, to pay the dividends and annual produce arising therefrom to the said [*daughter*] for her separate use, exclusively of her husband, the said [*husband*], and so that the same be not subject to his debts, contracts, or engagements, and so that my said daughter shall have no power to alien or anticipate the same dividends or annual produce, or any part thereof; And after the decease of either of them the said [*husband*] and [*daughter*], UPON TRUST to pay the said dividends and annual produce unto the survivor

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

Residuary bequest.

Devise of estates in mortgage and trust.

Legacy of £—— 3 per cent. Consols to be held

In trust for testator's daughter during joint lives of herself and husband, for separate and inalienable use; and after the decease of either,

In trust for survivor for life; and after his or her decease,

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equal force to general legacies of stock in the public funds, the legatees of which are, under the general rule, entitled to call for a transfer at the end of a year from the testator's death; and, if the transfer is longer delayed, they are entitled to a sum equal to the dividends accruing from that time. Under *specific* gifts of stock, or of any other species of property, real or personal, the devisee or legatee takes all the income accruing from the subject of gift subsequently to the testator's decease.

Where it is not (and it rarely is) intended that a legacy of stock shall be specific, care should be taken to avoid describing the stock bequeathed as belonging to the testator, or as standing in his name. The legacy should be simply of so much stock, and then it may be satisfied by a transfer of that amount of stock from whatever source obtained, being in fact undistinguishable from a legacy of a specified amount of money.

Specific legacies.

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

of them, for his or her own use, during his or her life; And after the decease of the survivor of them the said [*husband*] and [*daughter*], his wife, UPON TRUST to stand possessed of the said £—— Three Pounds per centum Consolidated Annuities, and the dividends and annual produce thenceforth to arise therefrom, IN TRUST for such child, or, if more than one, both or all such children of the said [*daughter*], by her deceased, her present, or any future husband, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain the age of twenty-one years or be married under that age, the same to be transferred and paid to such child, if only one, or such children equally, if more than one, at the age of twenty-one years as to every son, and at that age or marriage as to every daughter, or so soon thereafter as the decease of the survivor of them the said [*husband*] and [*daughter*], his wife, will permit.

The capital for children of daughter.

PROVIDED ALWAYS, that the issue of any and every son of the said [*daughter*], who shall die under the age of twenty-one years, leaving lawful issue living at his death, shall be entitled, and if more than one, equally, to the share in the said trust monies, funds, and premises, to which such son respectively would have been entitled if he had attained the said age.

Substitution of issue of sons dying before majority.

And in case there shall be no child of the said [*daughter*], who, being a son, shall attain the age of twenty-one years, or die under that age, leaving issue living at his death, or, being a daughter, shall attain the said age or be married, then as to the said £—— Three Pounds per centum Consolidated Annuities, and the dividends and annual produce to arise therefrom as aforesaid, IN TRUST for such person or persons as the said [*daughter*], whether covert or sole, shall by any deed or will, attested by one witness or more, appoint or bequeath the same; And in default of and subject to any such appointment, IN TRUST for the person or persons who, at the time of the decease of the survivor of them the said [*husband*] and [*daughter*], his wife, would be entitled to her personal estate in case she had then died intestate, and without leaving a husband, in the like shares and proportions as such persons (if more than one) would be entitled thereto.

In default of children, in trust for such persons as daughter shall appoint;

and in default of appointment, for her next of kin.

PROVIDED ALWAYS, and I hereby declare, that it shall be lawful for the trustees or trustee of this my will for the time being, after the decease of the survivor of them the said [*husband*] and [*daughter*], to pay and apply the whole or

Provision for maintenance until the vesting of shares.

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

any part of the annual proceeds of the presumptive share of every son of the said [*daughter*] during his minority, and of every daughter during her minority and discoverture respectively, for his or her respective maintenance and education or benefit, as to such trustees or trustee shall seem proper. And if the whole of such annual proceeds shall not be so applied, then the unapplied part shall be improved at interest, and go in augmentation and follow the destination of the share or respective shares from which the same shall have arisen; but the same accumulated fund shall nevertheless remain applicable, if occasion shall require, to the maintenance and education of the child from whose presumptive share the same shall have arisen. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee, with the consent in writing of the said [*husband*] and [*daughter*], or of the survivor of them, and after the decease of such survivor, then of the sole authority of the said trustees or trustee, to advance and pay any part not exceeding one half of the capital of the vested or presumptive share of every or any child of my said daughter in the trust premises under the trusts hereinbefore contained, during the minority of such respective child, or, subsequently thereto, for the apprenticing of him or her to any trade or business, or otherwise in or towards his or her advancement or preferment in the world, in such manner as the said trustees or trustee shall think proper; but the sums so advanced shall be taken as part of the actual or presumptive share of every such child respectively, and be accounted for accordingly. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee at any time or times, and from time to time, with the consent in writing of the said [*husband*] and [*daughter*], or the survivor of them, and after the decease of such survivor, then in the discretion of the said trustees or trustee, to sell and dispose of the said £—— Three Pounds per centum Consolidated Annuities, and to invest the money arising from such sale in any other of the stocks or funds or other government securities of Great Britain and Ireland, or on mortgage of freehold, copyhold, or leasehold estates, to be situate in England or Wales, and from time to time, with such consent and in such discretion as aforesaid, to vary and change the stocks, funds,

Provision for advancement.

Power to vary securities.

OF PERSONALTY FOR WIFE, DAUGHTER, AND HER HUSBAND AND CHILDREN.

and securities, as often as shall be thought fit; and that upon every such variation or transfer of the said trust funds and securities as aforesaid, or otherwise, any person or persons who shall pay any money to the said trustees or trustee for the time being shall be exempt from all responsibility in respect of the application thereof (*b*). PROVIDED ALSO, and I further declare, that if the said [*trustees*], or either of them, shall die in my lifetime, or shall at my decease renounce or be incapable of acting in the trusts of this my will, or if any trustee for the time being shall at any time or times thereafter die, or become unwilling or unable to act in the aforesaid trusts, it shall be lawful for the said [*husband*] and [*daughter*], or the survivor of them, with the consent in writing of the surviving or continuing trustee, if there be any such trustee, and if not, then of the proper and sole authority of the said [*husband*] and [*daughter*], or the survivor of them, and after the decease of such survivor, then for the surviving or continuing trustee for the time being of this my will, or, if there be no such trustee, for the renouncing or retiring trustee, or, if none, then for the executor or administrator of the last surviving trustee, to appoint any fit person or persons to supply the vacancy or vacancies so occurring in the said trusteeship; and that, immediately after every such appointment, the said trust stocks, funds, and securities, shall be transferred at the costs of my trust estate, in such manner that the same may vest in such new trustee jointly with the surviving or continuing trustee, or in such new trustees solely, as the case may require, subject to the trusts aforesaid; and that every such new trustee, as well before as after such transfer, shall have and may ex-

Power to change trustees.

As to the insertion of powers to trustees in certain cases.

(*b*) As the residuary personal estate is bequeathed to the wife absolutely, the trustees are not invested with the usual discretionary powers to compound debts, pay demands, &c., which it is important they should have when any interest in the residue is given to unborn or infant persons. Some practitioners, however, deem the possibility of the residuary legatee becoming incapable by lunacy of sanctioning the acts of the trustees, or of his dying pending the administration of the trust affairs, (by which event minors or persons not then in esse may eventually acquire an interest in the residue), to be a sufficient ground for inserting such powers, even when the residue is absolutely bequeathed to an existing adult person.

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ercise all the powers and authorities contained in this my will as effectually and in the same manner, to all intents and purposes, as if he had been named herein. AND FURTHER, that no one or more of the trustees hereby or hereafter to be appointed shall be answerable for any other or others of them, or for any money received under any receipt in which he or they shall join only for conformity, or by any means for involuntary losses; and that every trustee shall be allowed all charges and expenses incurred in the execution of the trusts hereof, including professional charges for business transacted or done by any trustee who may happen to be an attorney or solicitor (*c*). IN WITNESS whereof I have hereunto set my hand this —— day of ——, 18—.

Indemnities to trustees.

(*c*) *Vide ante*, Vol. 9, p. 337.

COAL WORKS, AND OTHER REAL AND PERSONAL ESTATE.

GENERAL DEVISE *and* APPOINTMENT *of* REAL ESTATES—PART, *to Testator's* WIFE *for* LIFE, *and subject thereto the* WHOLE *to such* USES *as Testator's* SON *shall* APPOINT; *and in Default of* APPOINTMENT, *to* SON IN FEE. POWER *to Trustees to* ENTER *and apply Rents for* MAINTENANCE *during* MINORITY. BEQUEST *of* HOUSEHOLD FURNITURE, *&c. to* WIFE *absolutely*. PECUNIARY LEGACY *in trust for* WIFE *for Life, and subject thereto for Testator's* CHILDREN *and their* ISSUE *as* WIFE *shall* APPOINT; *and in Default of Appointment, in trust for all the* CHILDREN EQUALLY. LEGACIES *to* SON *and* DAUGHTER *payable at* TWENTY-ONE *and* MARRIAGE. LEGACY *to a Trustee for the* SEPARATE *Use of a* MARRIED SISTER *of Testator*. BEQUEST *to* TRUSTEES *of* COAL *and* IRON WORKS, *upon Trusts to* CARRY *on the* CONCERNS *for a stated Period, with full* POWERS. DIRECTION *to* ADMIT *Testator's* SON *into the Concern at his Majority*. PROFITS *of* TRADE *and* RESIDUARY

COAL WORKS, AND OTHER REAL AND PERSONAL ESTATE.

PERSONAL ESTATE *(subject to Debts, Legacies, &c.), to be invested by Trustees, and held upon* TRUST *to pay an* ANNUITY *to Testator's* WIDOW *for Life, and* RESIDUE *in Trust for his* SON *and* DAUGHTERS *equally for their* LIVES; *and subject thereto, in Trust for their respective* CHILDREN *equally per* STIRPES. POWER *to* TRUSTEES *to* GIVE DISCHARGES, *&c.*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name and addition*]. In the first place I ratify and confirm the settlement made in contemplation of my marriage with [*name*], my present wife. I GIVE, DEVISE, AND APPOINT all and singular the freehold and copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, which I am seised of or in any manner entitled to or interested in, either in possession, reversion, remainder, or expectancy, or over which I have any power of appointment or disposition (except such hereditaments as are vested in me as trustee or mortgagee), to the uses, and subject to the powers and declarations hereinafter expressed (that is to say), AS TO ALL THAT my messuage or dwelling-house, with the gardens, lawn, pleasure ground, and appurtenances thereto belonging, situate at ——, and now in my own occupation, TO THE USE of my said wife [*name*], and her assigns, for and during the term of her natural life, keeping the same in good tenantable repair and order, and insuring the messuage and out buildings from loss or damage by fire. AND as to the same messuage and other premises from and immediately after the decease of my said wife, and as to all other the said freehold and copyhold hereditaments from and immediately after my own decease, TO THE USE of such person and persons for such estate and estates, and to and for such intents and purposes, charged and chargeable with such sum and sums of money, and in such manner and form in all respects, as my son [*name*] shall, by any deed or deeds, sealed and delivered in the presence of and attested by one witness or more, or by his last will and testament, duly executed for the devise of freehold estates, direct, limit, or appoint, give, or devise the same: AND for want and in default of such direction, limitation, or appointment, gift, or devise, and subject to any partial and incomplete disposition thereof,

Confirmation of marriage settlement.

General devise and appointment of estates.

As to the messuage, &c. in his own occupation;

To the use of his wife for life.

And as to the same premises after her decease, and all his other lands after his own decease,

To such uses as testator's son shall appoint; and in default of appointment,

COAL WORKS, AND OTHER REAL AND PERSONAL ESTATE.

TO THE USE of my said son [*name*], his heirs and assigns, for ever. PROVIDED ALWAYS, that if, at the time of the decease of the survivor of me and my said wife, as to the said hereditaments in my own occupation devised to her as aforesaid, or if, at the time of my decease, as to the residue of the said devised and appointed premises, my said son [*name*] shall be under the age of twenty-one years, then I empower and direct the trustees or trustee for the time being of this my will, to enter into and upon the said hereditaments and premises respectively, and receive the rents and profits thereof, and to apply and dispose of the said rents and profits, or such part thereof as the said trustees or trustee shall deem sufficient for the purpose, in and towards the maintenance and education of my said son, in aid of and addition to, but not by way of exoneration of, the fund hereinafter provided for such maintenance and education (*a*). And I empower and direct the said trustees or trustee, from time to time, to lay out and invest the unapplied residue or surplus of the said rents and profits, in their or his own names or name, in government or real securities, so as to form an accumulating fund, the principal of which said fund, as well as the income thereof, shall, at the discretion of my trustees, remain and be applicable, if occasion shall require, in and for the advancement or preferment of my said son during his minority; and I direct and declare, that the said accumulated fund, or so much thereof as shall eventually remain unapplied to the purpose aforesaid, shall be paid and transferred to my said son, when and as soon as he shall attain the age of twenty-one years; and in the event of his dying under that age, the same shall sink into and form a part of my residuary personal estate. I GIVE AND BEQUEATH to my said wife, for her own absolute use and benefit, all the household furniture, plate, linen, china, glass, printed books, pictures, and paintings, and also the coals, fuel, and other housekeeping and consumable stores, live stock, implements of gardening and husbandry, and other effects, except monies, securities for money, and the title deeds relating to my real estate, which

To son in fee.

Power to trustees to enter during minority of son, and apply rents for maintenance.

Bequest of household furniture, &c. to wife absolutely.

(*a*) Where more than one fund is made applicable to maintenance, and the destination of the unapplied income is different in regard to the several funds, the order or the proportions in which they are to be applied should be declared.

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shall be in and about my said mansion house at —— at the time of my decease, and also the carriage which I shall then use, and such two of my coach or saddle horses as my said wife shall choose and select, and the harness and accoutrements belonging to such carriage and horses, to and for the absolute use and benefit of my said wife. AND I GIVE AND BEQUEATH unto the said [*trustees*], their executors, administrators, and assigns, the sum of £——, to be appropriated at the end of six calendar months after my decease, UPON TRUST to invest the same in their names in the public funds or other government securities of Great Britain, or at interest upon real security in England or Wales, (such securities to be from time to time altered and varied as my trustees or trustee for the time being shall think fit, yet so that during the life of my said wife every such investment and alteration be made with her consent in writing). And my will is, that the said [*trustees*], their executors, administrators, and assigns, shall stand and be possessed of and interested in the said sum of £——, so bequeathed to them as aforesaid, and the stocks, funds, and securities in or upon which the same shall be invested, upon and for the trusts, intents, and purposes following (that is to say), UPON TRUST during the natural life of my said wife [*name*], to pay the dividends, interest, and annual produce of the said trust monies, stocks, funds, or securities unto my said wife or her assigns for her or their absolute benefit; AND from and after the decease of my said wife, my will is, that the said trust money, stocks, funds, or securities shall be IN TRUST for all and every, or such one or more, exclusively of the others or other of my children who shall be living at the time of the decease of my said wife, and the issue then living of any such child or children (whether such child or children be then living or dead) (*b*), at such age or respective ages, in such manner, and if the appointment shall extend to more than one, then in such shares and proportions, as my said wife, by any deed or deeds, instrument or instruments in writing, revocable or irrevocable, to be by her sealed and delivered in the presence of and attested by one witness or more, or by her last will and testament in

Bequest of £—— to trustees, upon trust, to invest, with power to vary securities;

but with the consent of wife during her life.

And upon trust to pay income to wife for her life.

And after her decease, in trust for all or any of the children or their issue, according to wife's appointment by deed or will.

(*b*) It seems in general to be better not to confine these powers to the issue of *deceased* children, as there are many cases in which it would be advisable to appoint to the issue of a living child.

writing, to be by her signed and published in the presence of and attested by two or more credible witnesses, shall direct and appoint: AND for want of such direction or appointment, or so far as the same, if incomplete, shall not extend, IN TRUST for all and every child and children of mine who shall survive me, in equal shares and proportions, to be vested interests in them respectively at my decease, *(Hotchpot clause, ut ante, p. 241.)* AND I GIVE AND BEQUEATH unto my said son [*name*], the sum of £——, to be paid to him at the end of twelve calendar months next after my decease, with interest at *5l.* per centum per annum from my decease, if he shall then be of the age of twenty-one years. ALSO I GIVE AND BEQUEATH unto each of them my three daughters [*names*], the sum of £——, to be paid to them respectively at the end of twelve calendar months next after my decease, with interest at the rate aforesaid from my decease, if they shall then respectively be of the age of twenty-one years, or be married. But if at my death my said son shall be under the age of twenty-one years, or my said daughters, or any or either of them, shall be under that age and unmarried, then my will is, that his, her, or their last-mentioned legacy or legacies shall be invested by and in the names of my said trustees, in the public funds or other government securities of Great Britain, or at interest upon real securities in England or Wales, to be from time to time altered and varied as occasion shall require; and the interest, dividends, and annual produce arising therefrom (as well before as after such investment as aforesaid), or such part thereof as my trustees shall deem sufficient for the purpose, shall be paid and applied in or towards the maintenance and education of such last-mentioned child or children; and the residue thereof, if any, shall be accumulated from time to time; AND the said legacy of £—— to my said son, if under age, as aforesaid, and the stocks, funds, or securities in or upon which the same shall be invested, together with the accumulations therefrom, if any, or so much thereof as shall eventually remain unapplied for maintenance and education as aforesaid, shall be paid, transferred, or assigned to him at his age of twenty-one years (*c*). AND the said legacies of £—— to

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And for want, &c. of appointment,

In trust for all the children equally.

Legacy of £—— to the son, payable twelve months after testator's decease, if of age.

Legacy of £—— a piece to the three daughters, payable twelve months after testator's death, if of age or married.

But if the son should be under age, or the daughters under age and unmarried,

their several legacies to be invested by the trustees.

And the income applied for maintenance and education,

and the residue to be accumulated.

The legacy of the son to be paid at twenty-one,

and the respec-

(*c*) Here it will be observed there is no power of advancement, as in most other precedents.

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tive legacies of the daughters to be paid at twenty-one, or marriage.

each of my said daughters, and the stocks, funds, or securities in or upon which the same shall be invested, and the accumulations therefrom, if any, or such part thereof as shall remain eventually unapplied for maintenance and education as aforesaid, shall be paid, transferred, or assigned to them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen.

But if the son should die under twenty-one, or any or either of the daughters under twenty-one, without being married, their respective legacies to sink into the residuum.

But, if my said son should die under the age of twenty-one years, or any or either or all of my said daughters shall die under that age, without being or having been married, then my will is, that the last-mentioned legacy or legacies of him, her, or them so dying, and the stocks, funds, and securities in or upon which the same shall be invested, and the accumulations, if any, therefrom, shall sink into and form part of the residue of my personal estate.

Legacy of £—— to a trustee;

AND I GIVE AND BEQUEATH unto [*trustee*], the sum of £——, to be paid at the end of twelve calendar months next after my death, with interest for the same at 5*l.* per centum per annum from the day of my death,

In trust for the sole use of the sister, and to be disposed of as she should by writing direct, free from the debts, &c. of her husband.

IN TRUST, nevertheless, for the sole use and benefit of my sister, wife of ——, and to be disposed of as she shall by any writing or writings, signed by her, order and direct, free from the debts and control of her present or any future husband; for which purpose it is my will that the receipts in writing of the said [*sister*], or any her appointee or appointees as aforesaid, shall, notwithstanding her present or any future coverture, be good and effectual discharges for her said legacy or sum of £——, and the interest thereof or any part thereof respectively.

Legacy of £—— a piece to his clerks.

AND I GIVE AND BEQUEATH unto such of my clerks [*names*], as shall be in my service or employ at the time of my decease, the sum of £—— a piece, to be paid at the end of three calendar months next after my decease.

Bequest to trustees of coal and iron works, leases, and residuary personal estate,

AND I GIVE AND BEQUEATH all my coal and iron works, parts or shares of coal and iron works, and all my leases and parts or shares of leases of coal and ironstone, with all lands and other appurtenances thereto belonging, and also all my ready money, securities for money, book and other simple contract debts, goods, chattels, and other personal estate and effects whatsoever not hereby otherwise disposed of; and I also appoint and dispose of all the

Upon trust to convert into money such parts of the per-

personal estate over which I have a power of appointment or disposition unto the said [*trustees*], their executors and administrators, upon and for the several trusts, intents, and

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purposes following (that is to say), UPON TRUST, with all convenient speed after my decease, to call in and convert into money such parts of my personal estate (except my said coal and iron works and concerns), as my said trustees, or the survivors or survivor of them, their or his executors or administrators, or other the trustees or trustee for the time being of this my will shall judge necessary for payment of my just debts, funeral and testamentary charges and expenses, and the several pecuniary legacies hereby bequeathed, and to pay and discharge therewith such debts, charges, expenses, and legacies accordingly; AND UPON FURTHER TRUST either to convert into money, or continue in the actual state thereof (*d*), any other part or parts of my residuary personal estate (except my said coal and iron works and concerns), as my said trustees or trustee for the time being shall think fit, and UPON TRUST to lay out and invest the money to arise from my said residuary personal estate and effects (except as aforesaid), after payment of my said debts, legacies, funeral and testamentary expenses, in the names or name of the said trustees or trustee for the time being, in some of the public stocks or parliamentary funds of Great Britain, or upon real securities in England or Wales, and from time to time to alter, vary, and transpose, at their or his discretion, as well the same stocks, funds, and securities, or any of them, as also such of the stocks, funds, or securities, being part of my personal estate at my decease, as my said trustees shall not think fit to convert into money, or call in as aforesaid. AND as to my said coal and iron works and concerns, my will is, and I hereby direct, that the trustees or trustee for the time being of this my will do and shall carry on and conduct the same, and transact all matters and things relating thereto, either alone or in conjunction with the other persons or person then interested as partners or partner therein, as the case may be, for the space of —— years next after my decease, but subject to the proviso hereinafter contained. AND for that purpose I authorize and empower my said trustees and trustee for the time being to hire and employ such persons, with such salaries as they or he shall think proper, and to enter into such

sonalty (except the coal and iron works) as trustees should judge necessary for payment of debts, funeral and testamentary expenses and legacies, and to pay the same accordingly.

And upon further trust to convert or continue in the actual state any other part of the personalty (except as aforesaid).

And upon trust to invest the proceeds, with power to vary securities.

And as to the coal and iron works, trustees to carry on the same for —— years.

Powers to the trustees in carrying on the concerns.

(*d*) Here it will be observed, that the discretion respecting the period and manner of conversion is introduced into the original trust, instead of being conferred by a subsequent clause.

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contracts and agreements, and to make such engagements respecting the premises as they or he shall think reasonable, and to increase or abridge the said business or concerns, and my capital therein, and to adjust and settle all accounts and transactions in which I shall be interested, and to refer any disputes concerning the same to arbitration, and to compromise and compound any debts owing to me, and to pay and satisfy any claims and demands made upon or against my estate, which my trustees shall deem to be fair and just, though the same may not be supported by legal evidence, and to make any sale or sales upon credit, and generally to transact all matters or concerns respecting my said business or concerns, and to do or cause to be done all acts and deeds relative thereto, in such and the same manner, to all intents and purposes, as if such trustees or trustee were absolutely entitled to or interested in the premises; it being my intention to give my trustees and trustee for the time being full discretionary power and authority to carry on my said business and concerns during the aforesaid period in such manner as to them or him shall seem most advantageous, and most for the benefit of the persons interested under the trusts hereinafter expressed. AND I HEREBY DECLARE, that all losses, charges, and expenses attending or to be incurred in the carrying on of my said business and undertakings, and the concerns thereof respectively, shall be borne, paid, and defrayed, in the first instance, out of the gains and profits thereof, and if they shall be insufficient, then out of my residuary personal estate and the monies to arise therefrom, and all the gains, profits, and increase of the said business and undertakings shall be added to and considered as part of the said residuary personal estate, and shall be applied and go in such manner as hereinafter is directed. AND my will is, that my trustees and trustee for the time being shall from time to time, after my decease, take annual accounts of the stock and capital employed in my said coal and iron works and concerns, and shall make out annual accounts of the gains, profits, losses, and expenses of the same works and concerns, and of all transactions relating thereto, which accounts shall be audited and settled by my said wife, and my said four children, or such of them as shall from time to time be living and shall have attained the age of twenty-one years. AND in case my

All losses and gains to fall upon and be deemed part of personal estate.

Trustees to take annual accounts of stock and capital,

and make out annual accounts of gains and losses.

Accounts to be audited by wife and children.

And in case the

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said wife and all my said children shall die while my said works and concerns shall be carried on, then by the respective guardians of the several infant children of them my said children, or of such of them as shall leave children. PROVIDED ALWAYS, and my will is, that if my said son shall attain the age of twenty-one years, and shall thereupon or at any time thereafter be desirous to enter into and participate in my said business and concerns, then my trustees or trustee for the time being shall admit my said son into such part or proportion of my said business or concerns as they or he shall think proper, not being less than one equal fourth share, nor exceeding in the whole one equal moiety or half share thereof, and shall thereupon assign and make over to my said son a like proportion of all the capital stock, leases, monies, and other effects belonging to or used and employed in the said works and concerns, upon my said son giving security unto and to the satisfaction of my trustees or trustee for the time being for the payment of the worth or value (to be settled by two indifferent persons, one to be nominated by each party) of so much and such part of the premises as shall be assigned to my said son, with interest at the rate of 5*l.* per centum per annum; which security may be the bond of my said son, if my said trustees or trustee shall think proper to accept the same, but not otherwise. PROVIDED ALWAYS, and it is my will, that if my trustees or trustee for the time being shall at any time or times during the said period of —— years, to be computed from my death, find it disadvantageous, or deem it unadvisable to carry on my said business and concerns, or any part or branch thereof, then, and in any such case, it shall be lawful for them or him, with the consent in writing of my said wife and my said four children, or such of them as shall be then living and shall have attained the age of twenty-one years; and in case my said wife, and all my said children, shall die while my said works and concerns shall be carried on, then with the consent in writing of the respective guardians of the several infant children, if any, of them my said children, or of such of them as shall leave children; and if there shall be no such children, then in the discretion and of the sole authority of the said trustees or trustee, absolutely to close and discontinue my said works and concerns, or any part or branch

wife and children should all die, then by the guardians of the infant grandchildren.

Power for trustees to admit the son into a certain proportion of the concerns,

and to assign to him a like proportion of the stock and effects, upon his giving security.

Power for trustees to discontinue the concerns, if disadvantageous.

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thereof, and all accounts and transactions relating thereto. And my will is, that upon such determination of my said business and concerns, or any part thereof, or else upon the expiration of the said term of —— years hereinbefore appointed for carrying on the same, my trustees or trustee for the time being do and shall sell, collect, and convert into money, all the capital stock, leases, monies, and other effects belonging to or used in the same; and do and shall thereout pay all debts and expenses owing and incurred from and on account of the same, and adjust and settle all accounts relating thereto. And as to as well the clear gains and profits of my said works and concerns while the same shall be carried on, and the clear surplus of the monies into which the capital of the said concerns shall be converted on the same being closed, as also the residue or surplus of my said personal estate, and the monies to arise therefrom after payment of my said debts, legacies, funeral and testamentary expenses, my will is, that my trustees and trustee for the time being do and shall lay out and invest the same from time to time in their or his names or name in some of the public stocks or other government securities of Great Britain, or at interest upon real security in England or Wales, and do and shall from time to time alter, vary, and transpose, at their or his discretion, the same several stocks, funds, and securities, and also such stocks, funds, and securities, being part of my personal estate at my decease, which they or he shall not think fit to convert into money or call in, under the discretionary power hereinbefore in that behalf given. And I HEREBY DECLARE my will to be, that my said trustees shall stand and be possessed of and interested in all my said residuary personal estate and effects, subject as aforesaid, and all my said coal and iron works and concerns during the continuance of the same, and the monies to arise therefrom and from the conversion into money of the capital thereof when the same concerns shall be closed, and the stocks, funds, and securities, in or upon which such residuary personal estate and effects, gains, profits, and capital, shall be laid out or invested, or which shall otherwise form part thereof respectively, and the dividends, interest, and annual produce thereof, upon and for the several trusts, intents, and purposes following (that is to say), UPON TRUST, in the first

Upon the determination of the concerns, trustees to sell and convert stock into money,

and to pay all debts and expenses of the concerns.

And as to as well the clear gains, as also the residue of the personal estate, after payment of debts, legacies, &c.

Trustees to invest the same, with power to vary securities.

And to stand possessed of all the residuary personal estate,

upon following trusts,

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place, by and out of the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities, and the gains and profits of the said business and concerns, to pay to my said wife [*name*], and her assigns, for and during her life, one annuity or clear yearly sum of £——, by equal quarterly portions, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year; the first payment thereof to be made on such of the said quarterly days of payment as shall next happen after my decease, and also a proportional sum for the fractional period, if any, of the quarter which shall or may be pending or current at the time of the decease of the said [*wife*], to be paid immediately on such decease (*e*). AND, UPON TRUST, to pay the residue or surplus of the said interest, dividends, and annual produce, gains and profits, during the continuance of the said annuity, and the whole of such interest, dividends, annual produce, gains and profits, after the determination thereof, unto my said son [*name*], and my said three daughters [*names*], and their several assigns, during the respective lives of my said son and three daughters, in equal shares and proportions; and from and after the respective deceases of my said son and daughters, then, as to my said residuary personal estate and effects, and the gains, profits, and capital of my said coal and iron works and concerns, and the monies to arise therefrom respectively, IN TRUST for all and every such of the several and respective children of my said son and three daughters, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or shall marry, which shall first happen, in equal shares, if more than one; but such children of my said children to take not per capita, but per stirpes, the shares or share in the several last-mentioned premises, to the dividends, interest, or annual produce whereof his, her, or their deceased parent or parents respectively were, or, if living, would have been,

To pay an annuity of £—— to his wife for her life, payable quarterly.

And as to the residue of the income,

In trust for the son and three daughters for their lives equally.

And as to the residuary personal estate, after the decease of the son and daughters,

In trust for the children of the son and daughters equally, to take per stirpes.

(*e*) According to the view taken, *ante*, Vol. 9, p. 576, of the recent Apportionment Act (4 & 5 Will. 4, c. 22), (in which the Editor is glad to find that he does not stand alone) (*a*), it would not apply to the present annuity.

(*a*) *Vide* Hayes's Introduction to Conveyancing, 2nd ed., p. 163.

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entitled during his, her, or their life or respective lives. AND if any one or more of my said son and three daughters shall die without having a child, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then, as to the part or share, parts or shares, as well original as accruing by virtue of this present clause, which would have belonged to the child or children of such one or more of my said son and three daughters, of whose body there shall be such failure of issue as aforesaid, in case there had not been such failure of issue of or in the last-mentioned monies and premises, the same to be IN TRUST for the survivors or survivor or others or other of my said son and three daughters, and of such of the respective children of the same son and daughters, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, which shall first happen, for such and the same interests, and in such and the same manner in all respects as my last-mentioned son and daughters, and such issue of the same son and daughters as aforesaid, or any of them respectively, as may happen to be severally entitled to original shares or an original share in the said residuary personal estate, works, and concerns, and other last-mentioned premises under the trusts lastly hereinbefore declared; and if all my said four children, save one, shall die without any child of their respective bodies, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then, as to the whole of the said residuary personal estate, works, and concerns, and the other last-mentioned premises, the same to be IN TRUST for my remaining child, and such child or children of his or her body, as, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry, for such and the same interests and in such and the same manner as my last-mentioned child, and such his or her issue as aforesaid, and every of them, will be or in any case would have been respectively entitled to an original share of my said residuary personal estate, works, concerns, and other last-mentioned premises under the trusts of this my will. AND if there shall be no child of any of my said children, who, being a son, shall attain the age of twenty-one

Clause of accruer among the respective stocks.

In case of a total failure of the objects of preceding trusts.

years, or, being a daughter, shall attain that age or marry, then my will is, that my said trustees do and shall, in case there shall be any child or children of my brother [*name*], living at the time of the decease of the survivor of all them my said children, levy and raise by and out of the last-mentioned trust-monies and premises (but subject and without prejudice to the said life annuity of £——, if the same shall be then subsisting), the sum of £—— a piece for each and every of the children of the said [*brother*], who shall be so living at the time of such decease, and pay the same sum to each such child for his, her, or their own benefit respectively; And as to my said residuary personal estate and effects, and the gains, profits, and capital of my said coal and iron works and concerns, and the monies to arise therefrom respectively, and the stocks, funds, or securities in or upon which all such monies shall be laid out and invested, and every of the said premises from and after the respective deceases of my said son and three daughters, without having any such child as aforesaid (but subject as aforesaid), In trust for my brother [*name*], his executors, administrators, and assigns, for his and their absolute benefit. Provided always, and my will is, and I hereby declare, that in case at my decease my said son [*name*] shall be under the age of twenty-one years, or any or all of my said daughters shall be under that age and unmarried, or in case at any time after my decease and the decease or respective deceases of any of my said four children, any one or more of their respective children, being a son or sons, shall be under the age of twenty-one years, or, being a daughter or daughters, shall be under that age and unmarried, then the trustees or trustee for the time being of this my will do and shall, during every such minority or minority and discoverture (as the case may be), pay and apply the annual income arising from the expectant or presumptive part or share or parts or shares of such child or children, grandchild or grandchildren respectively of the last-mentioned trust monies, stocks, funds, securities, and premises, or so much thereof as the said trustees or trustee shall think proper, in or towards the maintenance and education of my said son, or such one or more of my last-mentioned daughters, or such my grandchild or grandchildren as last aforesaid, as

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In case there should be any children of testator's brother then living,

Trustees to raise out of the last-mentioned trust monies,

£—— a piece for the children of brother.

And as to the residuary personal estate after the decease of testator's son and daughters, and failure of their issue,

In trust for testator's brother absolutely.

Proviso for maintenance and education of children and grandchildren during minority or minority and discoverture.

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the case may be; and do and shall accumulate and improve the residue or surplus (if any) of the said annual income, by investing the same and the produce thereof from time to time in the names or name of the trustees or trustee for the time being in some of the public funds of Great Britain, or at interest upon real security in England or Wales, to be from time to time altered and varied as occasion shall require, and such accumulations respectively to be added to and follow the destination of the principal or capital of the share or respective shares from which the same shall have proceeded; but the same nevertheless to remain applicable, in the discretion of the said trustees, to the maintenance and education of the child or children from whose presumptive share or respective shares the same may have arisen. And I declare, that in the exercise or performance of the power or trust lastly hereinbefore contained, it shall not be incumbent on my trustees to inquire whether the object or objects thereof is or are entitled to maintenance out of any other fund, or from any other person. And my will is, and I hereby declare, that the receipts of my trustees or trustee for the time being shall be good and sufficient discharges for all or any of the monies which they or he shall from time to time receive under the trusts of this my will, whether the same shall arise from my said business and concerns, or the conversion into money of all or any part of my said residuary personal estate, or from altering or transposing all or any of the stocks, funds, or securities to be acquired under the trusts of this my will, or otherwise howsoever. And I nominate and appoint the said [*trustees*] executors of this my will: And I also nominate and appoint the said [*trustees*] and the survivors and survivor of them guardians and guardian of such of my sons as at the time of my decease shall be under the age of twenty-one years, and such of my daughters as shall then be under that age and unmarried, during the minority or minority and discoverture (as the case may be) of each such son and daughter respectively. [*Add clauses for changing and indemnifying trustees*]. And lastly, I hereby revoke all former and other wills by me made. In witness, &c.

And for accumulating the surplus of the dividends,

for the benefit of the children and grandchildren.

Receipts of trustees to be discharges.

Appointment of executors and guardians.

Clauses for changing and indemnifying trustees.

Revocation of former wills.

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WILL BEQUEATHING LEASEHOLDS ABSOLUTELY, *and* POLICIES *of* LIFE *and* FIRE INSURANCE *relating thereto, and* APPOINTING *the* LEGATEE LIMITED EXECUTOR *in respect thereof.* GENERAL DEVISE *and* BEQUEST *of* REAL *and* PERSONAL ESTATE *in Trust* FOR SALE. *Certain* STOCK LEGACIES *to be raised out of the* PROCEEDS *for* TWO *of Testator's Sons for Life (determinable on Alienation), with ulterior Trusts for* WIFE *for Life (as to one), and their respective* CHILDREN. POWER *to the other* SON *to appoint* INCOME *to* WIFE *for Life. One* MOIETY *of* RESIDUE *to* ANOTHER *Son* ABSOLUTELY, *with a* SUBSTITUTION *of his* WIFE *and* CHILDREN *in case of his* DYING *in* TESTATOR'S LIFETIME. *Other* MOIETY *of* RESIDUE *in trust for Testator's* DAUGHTER *for* SEPARATE *and* INALIENABLE *Use, and her* HUSBAND *and* CHILDREN. PROVISIONS *for* MAINTENANCE *and* ADVANCEMENT. CLAUSES *of* SURVIVORSHIP *and* ACCRUER. POWERS *to* VARY SECURITIES, GIVE DISCHARGES, *and* APPOINT NEW TRUSTEES, *Testator himself nominating on first two Vacancies.* DEVISE *of* MORTGAGE *and* TRUST ESTATES. (*Variation where Power to* APPOINT *Life Interest to* WIFE *is* RESTRICTED *to a definite Share as against* CHILDREN).

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE AND BEQUEATH to my son [*name*], ALL THAT my leasehold messuage or dwelling-house in —— Street, in the county of Middlesex, now in my occupation, TO HOLD the same unto my said son, his executors, administrators, and assigns, for all the term and estate which I shall have therein at the time of my decease (*a*); and I

Specific bequest of leasehold messuage.

(*a*) *Vide ante*, p. 116.

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give and bequeath to my said son any policy or policies of fire or life insurance which I have already effected or may hereafter effect on the said premises, or on any of the lives named in the lease or leases by which the same may for the time being happen to be held. AND I ALSO GIVE AND BEQUEATH unto my said son all the household furniture, and other chattels and effects of every description (except money and securities for money), which shall be in and about my said messuage or any other house which I may happen to occupy at the time of my decease, for his absolute use and benefit. AND I APPOINT my said son [*eldest son*] executor of this my will, so far as relates to the said leasehold messuage and policies of insurance, but not in respect of any other parts of my personal property and effects (*b*). And I direct, that the expense attending the limited probate to be taken out by my said son shall be paid out of my residuary personal estate (*c*).

—of household furniture, &c.

Appointment of legatee of leaseholds and policies to be limited executor.

Convenience attending the creation of a limited executorship.

(*b*) Where a leasehold estate or a legal chose in action is bequeathed specifically, it is convenient to constitute the legatee executor, quoad the subject of gift, for the purpose of clothing him with the rights, and of exempting the general executors from the risks, incident to the representative character in regard to the property in question; otherwise the legatee of a chose in action must be entrusted by the executors with an authority to sue in their names; and with respect to leaseholds, the executors become liable to the rent and covenants; and as such liability continues even after the property has been legally vested in the legatee by assent (supposing the testator to have been bound by express covenant, and not merely in virtue of his ownership of the term), and after the executor has parted with the assets among the legatees, this is one of the most formidable responsibilities attendant on an executorship, and is a source of much perplexity and dispute between legatees and executors in regard to the indemnity which the latter are entitled to require. (*Vide ante*, Vol. 3, 2nd ed.) In proportion as the rent approaches to the annual value of the property, and the covenants in the lease are onerous, of course the proposed scheme of exemption the more forcibly recommends itself. Too much regard cannot be paid by will-makers to every expedient calculated to facilitate the administration of the trust affairs, and to remove the objections which often deter cautious and capable men from filling, at the call of friendship or benevolence, these important posts of usefulness. The existence of extensive liabilities, contracted by a testator as lessee, may supply a reasonable ground for renouncing an executorship to which those liabilities are adherent.

(*c*) It seems proper to declare on whom the expense of the limited

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I GIVE, DEVISE, AND BEQUEATH all the residue of my freehold and leasehold messuages, lands, tenements, and hereditaments whatsoever, whether in possession, reversion, remainder, or expectancy, situate and being in the county of ——, or elsewhere, in Great Britain, and also all my parts and shares in the capital stock of a company or establishment, called "The —— Company;" and all the residue of my personal estate and effects, of what nature or kind soever and wheresoever, and also all the real and personal estate and effects over which I have a general power of testamentary appointment, unto and to the use of [*trustees*], their heirs, executors, administrators, and assigns for ever, or for and during all such estate, right, term, and interest, or several estates, rights, terms, and interests as shall belong to me therein at the time of my decease, UPON TRUST, with all convenient speed after my decease, by public auction or private contract, or partly by public auction and partly by private contract, as the said trustees or trustee may think proper, absolutely to sell and dispose of and convey and assure the said messuages, lands, tenements, and hereditaments, either altogether and in one lot, or by parcels and in several lots, and also such parts of the said personal estate as shall be in their nature saleable; with full power and liberty, in their or his discretion, to purchase in any part of the said real or personal estate which shall be offered for sale by auction, and also to make and enter into any special stipulations respecting the evidence of title to be required by any purchaser, and also to rescind or vary any contract for sale that the said trustees or trustee may have entered into. AND UPON FURTHER TRUST to collect in and receive such part of the said personal estate as shall consist of credits, monies out at interest, and securities for money not proper to be retained according to the trust for investment hereinafter contained, and to stand and be possessed of and interested in all monies to be raised by such sale or sales, and to be collected

General residuary devise and bequest,

Upon trust to sell and convert residuary estate.

probate is to fall, as the point may otherwise occasion dispute. The probate being short, the expense, it is presumed, must be inconsiderable; certainly much less than that of obtaining limited administration to a deceased trustee in respect of an attendant term of years, which, it will be observed, is an analogous proceeding.

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in and received as aforesaid, and also of all other the said personal estate and effects whatsoever and wheresoever, upon the trusts hereinafter declared concerning the same: nevertheless, I empower my trustees to defer the sale and conversion of my said shares in the —— Company, and of any other parts of my said real and personal estate, so long as they shall deem it expedient so to do; and I declare, that in the meantime the rents, interest, and annual income arising therefrom, shall, from the day or time of my decease, be paid and applied to and for the person and persons who would be entitled, under the trusts hereinafter declared, to the income arising from the proceeds of such parts of my trust estate. And I declare that the said trust estate shall, from the day or time of my decease, be deemed and considered as personal property for all the purposes of this my will, although any part thereof shall actually remain unconverted. And I empower my trustees or trustee for the time being to let and demise any part of the trust estate which shall remain unsold, at rack rent, from year to year, or for any term not exceeding twenty-one years in possession. And I direct and declare that my said trustees or trustee for the time being shall stand and be possessed of and interested in the monies arising from the real and personal estates hereinbefore devised, bequeathed, and appointed as aforesaid, UPON TRUST, in the first place, to pay thereout all my just debts, funeral and testamentary expenses, and also the expenses incidental to the execution of the trusts hereof; and, in the next place, to raise, retain, and pay the several legacies following, namely, *(here enumerate legacies, including one to the trustees in the event of their undertaking the trusts.)* AND, UPON FURTHER TRUST, that the trustees or trustee for the time being of this my will shall and do appropriate and set apart the sum of £—— Three Pounds per centum Consolidated Bank Annuities, if there shall be a sufficient sum in that stock standing in my name at the time of my decease, and if not, then shall and do purchase the same in their or his names or name, and shall and do stand and be possessed thereof, Upon the trusts following, that is to say, as to £—— Three Pounds per centum Consolidated Bank Annuities (being one moiety or half part of the said sum of £—— Three Pounds per centum Consolidated Bank Annuities), UPON TRUST to pay the dividends, interest, and

Power to suspend conversion.

—to lease.

Declaration of trust of monies arising from real and personal estates.

Trust to appropriate a certain amount of stock.

As to one moiety thereof,

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annual produce for the time being thereof into the proper hands of my son [*second son*], during his life, for his own use and benefit, subject nevertheless to the proviso hereinafter contained concerning the same; and after the decease of my said son [*second son*], then UPON TRUST to pay the dividends, interest, and annual produce for the time being arising from the same £—— Three Pounds per centum Consolidated Bank Annuities, into the proper hands of [*name*] the wife of my said son, during her life, for her separate use, free from the control and debts of her husband for the time being, and so that she shall have no power to alien or anticipate the growing payments thereof (*d*). And after the decease of the survivor of them the said [*second son*], and [*wife*] his wife, then UPON TRUST to transfer and pay the same £—— Three Pounds per centum Consolidated Bank Annuities, and the dividends, interest, and proceeds thereof, unto and amongst the child, if only one, or both or all the children, if more than one, of my said son [*second son*], in manner hereinafter mentioned. AND as to £—— Three Pounds per centum Consolidated Bank Annuities, (being the other moiety or half part of the said £—— Three Pounds per centum Consolidated Bank Annuities), UPON TRUST to pay the dividends, interest, and annual produce thereof into the proper hands of my son [*third son*] during his life, for his own use and benefit, subject, nevertheless, to the proviso hereinafter contained concerning the same. And after the decease of my said son [*third son*], UPON TRUST to transfer and pay the said last-mentioned £—— Three Pounds per centum Consolidated Bank Annuities, and the dividends, interest, and proceeds thereof unto and amongst the child, if only one, or both or all the children, if more than one, of my said son [*third son*], in manner hereinafter mentioned. PROVIDED ALWAYS, and I hereby direct,

In trust for second son and his wife successively for life, and after the death of survivor,

Upon trust to transfer the capital to the children of second son.

As to the other moiety of stock, in trust for the third son for life, and after his decease,

In trust to transfer the capital to the children.

Proviso, deter

(*d*) As this trust in favour of the wife may, under the proviso for cesser of the anterior trust in favour of the husband, take effect in his lifetime, the restraint on anticipation does not contravene the recent doctrine (*a*), as it would do if the trust in her favour was absolutely postponed until her husband's decease, in which case the coverture contemplated in the trust must necessarily be future.

(*a*) *Vide* note, *post*, and Index to this volume, title "Separate Use."

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mining the life interest of sons on alienation, bankruptcy, &c.

that in case the said [*second son*] and [*third son*], or either of them, shall at any time or times assign, charge, or incumber the dividends, interest, and annual produce hereinbefore directed to be paid to them respectively, under the trusts aforesaid, or any part thereof respectively, or in case the same shall, by reason of the bankruptcy or insolvency of my said sons, or either of them, or by any other means whatsoever, become vested in or payable to any person or persons whomsoever other than my said sons or son respectively, then and thenceforth, and in either of such cases, the trust hereinbefore declared for the benefit of such son or sons respectively shall cease and be void; And I direct and declare, that the dividends, interest, and annual produce, the trust whereof shall so cease or become void, shall, immediately thereafter, go and belong to the person or persons who would have been entitled to the same respectively, by virtue of the trusts aforesaid, in case such son or sons respectively had departed this life. Provided always, and I hereby declare, that, notwithstanding the trusts hereinbefore contained, and in derogation of and precedence to such of the same trusts as are subsequent or posterior to the said trust created or declared unto or in favour of my said son [*third son*], during his life, determinable nevertheless as aforesaid, but subject and without prejudice to such determinable trust, it shall be lawful for the said [*third son*], either before or after marriage, by deed or will, to appoint and dispose of the dividends, interest, and annual produce of the said £—— Three Pounds per centum Consolidated Bank Annuities, the trusts whereof are lastly hereinbefore declared, or any part thereof, unto or in favour of any wife or widow for the time being of the said [*third son*], for and during her natural life, either absolutely, or subject to such conditions and restrictions, and in such manner in all respects, as my said son shall think proper (*e*). And I direct,

Annual income to go to the ulterior *cestui que trust.*

Power to third son to appoint income to wife for life.

(*e*) This power would enable the son to make a settlement on an intended wife out of the trust fund.

A power of creating a provision for a wife is often a proper and convenient appendage to a life interest given to a male person, though such powers have certainly not obtained such general adoption, in reference to personalty, as the power of jointuring, which is ordinarily given to a

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that the several legacies hereinbefore bequeathed shall be delivered, paid, retained, and appropriated, as soon as convenient after my decease, and the pecuniary legacies shall carry interest at the rate of 4*l.* per centum per annum, and the stock legacies a sum equal to the dividends thereon, from the period of three calendar months after my decease, if the same respectively shall not be paid or transferred by that time. And I direct, that the legacy duty on all the legacies of every description bequeathed by this my will, and all expenses incident thereto, shall be paid out of my residuary personal estate. And as to, for, and concerning all the residue and surplus of the aforesaid trust monies which shall remain after the several deductions, appropriations, and payments hereinbefore mentioned, and all other the said

As to interest on legacies and legacy duty.

Trusts concerning the residue of the proceeds.

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tenant for life of real estate. The power in the text is made to extend over the whole fund, and to take effect, in derogation as well of the trusts in favour of the children of the donee, as of the ulterior objects. Sometimes, however, it is restricted to a definite share, as against the children, and extended to the entirety as against the persons to whom the property is limited in default of children. The clause in the text would then be modified as follows:—

Power to third son to settle on wife a moiety of income as against children, and the whole income as against the ulterior *cestuis que trust.*

"Provided always, and I hereby declare, that, notwithstanding the trusts hereinbefore contained, and in derogation of and precedence to such of the same trusts as are subsequent or posterior to the said trust created or declared in favour of my said son [*third son*] during his life, determinable as aforesaid, but subject and without prejudice to such determinable trust, it shall be lawful for the said [*third son*], either before or after marriage, by deed or will, to appoint or dispose of one moiety or equal half part of the dividends, interest, and annual produce of the said £—— Three Pounds per centum Consolidated Bank Annuities; and in case my said son [*third son*] shall have no child who shall live to acquire an absolutely vested interest in the said Bank Annuities, under the trusts aforesaid, then the whole or entirety of the said dividends, interest, or annual produce, or any part thereof, unto or in favour of any wife or widow for the time being of the said [*third son*], for and during her natural life, either absolutely or conditionally, and in such manner in all respects as my said son shall think proper."

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personal estate and effects, I direct and declare, that the said trustees or trustee for the time being of this my will shall and do pay, assign, and transfer one equal moiety or half part thereof unto my said son [*eldest son*] for his own use and benefit absolutely. And in case my said son [*eldest son*] should happen to die in my lifetime, then I direct that the said moiety or equal half part of the said trust monies shall be retained and held by the trustees or trustee for the time being of this my will, Upon trust to lay out and invest the same in the purchase of stock in some or one of the public funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates, the leaseholds being held for an absolute term, whereof not less than forty years shall be then unexpired (*f*); and to stand possessed thereof, Upon

One moiety to eldest son absolutely.

In case of son's decease in testator's lifetime, in trust for his wife and children.

(*f*) This trust expresses what is sometimes matter of doubt; namely, whether trustees ought to lend money on leasehold securities, and, if so, what length of term should be considered sufficient. The absolute exclusion of leasehold mortgages is clearly impolitic, as it may preclude the opportunity of an advantageous investment. It will be observed, that, by the trust in the text, investment is not restricted in the ordinary manner to real securities "in England or Wales," so that it would allow of money being laid out in an Irish mortgage. Having regard to the improved and still progressive condition of Irish agriculture, and the consequent increase in value of lands in that country, and the high rate of interest allowed by law, (to say nothing of the additional protection, derivable, in the opinion of some at least, from the system of registration), it deserves consideration, whether the continuance of the local restriction in question is advisable, and whether it ought not, now that good securities are difficult to be obtained at all, to be left to the discretion of trustees to invest, on an eligible security offered in any part of the united kingdom, in reliance upon their exercising all the additional vigilance, which remoteness of locality, or other circumstances, may require.

As to extending the trust for investment to leaseholds and to real securities out of England.

The editor perceives, since writing the preceding observations, that the recommended extension of the trust for investment has been, to a considerable extent, effected by the legislature, an act having passed in the last session of parliament (4 & 5 Will. 4, c. 29), empowering trustees, who are authorized or directed to lend money at interest on real securities in England, Wales, or Great Britain, to lend the same on real securities in Ireland, with the requisition only, that, in case any minor or unborn child or lunatic shall be interested, the loan be made under the direction of the Court of Chancery or Exchequer in England, to be obtained upon

Stat. 4 & 5 Will. 4, c. 29, as to investments on real securities in Ireland.

TRUST to pay the dividends, interest, and annual produce for the time being arising therefrom unto [*eldest son's wife*], the wife of my said son [*eldest son*], during her life, for her own use, and after her decease, UPON TRUST to transfer and pay the principal unto and amongst the child or children of my said son [*eldest son*], equally, if more than one, to be payable at the same or the like ages, days, and times, and to be under and subject to the same or the like powers, restrictions, and limitations, and with the same or the like benefit of survivorship and accruer, and in the same or the like manner in all respects as are herein expressed and declared concerning the respective moieties of the said £—— Three Pounds per centum Consolidated Bank Annuities, hereby bequeathed to or in trust for the children of my said sons [*second son*] and [*third son*] respectively. AND AS TO, FOR, AND CONCERNING the other or remaining moiety or half part of the last-mentioned residue and surplus of the said trust monies, to arise and be produced as aforesaid, and of all other the said personal estate and effects, I DIRECT AND DECLARE, that the said trustees or trustee for the time being of this my will shall and do lay out and invest the same in their or his own names or name, in the purchase of stock in

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As to other moiety of residue,

Upon trust to invest in the funds, or on mortgage securities,

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petition in a summary way. Courts of equity in England are enabled to make the same orders and decrees for the payment of moneys lent by trustees or public bodies, under the authority of this act, as if the lands had been situate in England; and process against the lands or parties may be obtained from the Court of Chancery or Exchequer in Ireland, on an inrolment being made of a copy of the decree or order of the English Court; and the Irish Court is empowered to make orders consequent on such process. This enactment, though it certainly diminishes, does not wholly supersede the necessity of extending trusts for investment to real securities in Ireland, as recommended in the present note, since the preliminary step directed by the act, namely, the obtaining an order of an English Court of equity, would be attended with some trouble and expense; though it is to be remembered, that the facilities afforded by the act, in regard to the issuing of process against the lands or person of the mortgage debtor, are only to be obtained where the loan is made under the authority and in compliance with the requisitions of the statute. It is now necessary that a testator or settlor who means to prevent his trustees from lending money on Irish real securities should expressly prohibit their doing so.

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some or one of the public funds of Great Britain, or on such mortgage securities as aforesaid, and shall and do from time to time, as they or he shall see fit, vary and change the funds and securities on which the same shall for the time being be invested, for any other funds of the like nature, as aforesaid, and shall and do stand and be possessed of the same trust monies, stocks, and funds, and of the dividends, interest, and annual produce thereof, UPON TRUST to pay the dividends, interest, and annual produce for the time being arising therefrom, into the proper hands of my said daughter [*name*], wife of [*husband*], of ——, during her life, for her separate use, free from the control and debts of her husband for the time being, and so that she shall have no power to alien or anticipate the growing payments thereof; and from and after the decease of my said daughter [*name*], then UPON TRUST to pay the dividends, interest, and annual produce for the time being arising from the said last-mentioned trust monies, stocks, and funds, unto the said [*husband of daughter*], during his life, for his own use and benefit; and after the decease of the survivor of them my said daughter and her said husband, then UPON TRUST to transfer and pay the said last-mentioned trust monies, stocks, and funds, and the dividends, interest, and proceeds thereof, unto and amongst the child, if only one, or both or all the children, if more than one, of my said daughter [*daughter*], in manner hereinafter mentioned. AND IT IS MY WILL, and I do hereby direct, that the trusts for or for the benefit of the children of the said [*second and third sons*] and [*daughter*] respectively hereinbefore contained shall extend to and comprise the children of any past, present, or future marriage, and whether such children respectively shall happen to be born before or after the determination of the trust or trusts precedent or prior to the trust or trusts in favour of such child or children respectively (*g*), and that the share of each child

and pay the income to testator's daughter for her separate and unalienable use for life, and after her death,

In trust for husband of daughter for life, and after his death,

Upon trust to transfer the capital to the children of daughter.

Direction as to the class of children to be entitled, and the time of transferring children's shares.

As to gifts to children.

(*g*) Although a gift to the children generally of a living person will extend to children by a deceased or future husband or wife, yet where the existing husband or wife takes a life interest in the fund, which is ultimately given to the children, it is better to express the intention to let in the issue of a former or future marriage, as the general frame of the trusts, or some expressions in them, may possibly give rise to a plausible

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who shall be a male shall be payable to him respectively when and as he respectively shall attain his age of twenty-one years; and the share of each of the same children respectively who shall be a female shall be payable to her respectively when and as she respectively shall attain her age of twenty-one years, or day of marriage, which as to each of them respectively shall first happen; nevertheless, in case any of such male children should attain the said age, or any of such female children should attain the said age or marry before the death of the survivor of their said parents, then their respective shares shall be paid and transferred to them as soon as conveniently may be after the death of such survivor respectively. And in case any one or more of the children of the said [*second and third sons*] and [*daughter*] respectively, being a male or males, should depart this life under the age of twenty-one years, without leaving any lawful issue living at his or their death or respective deaths, or, being a female or females, should depart this life under the age of twenty-one years, and without having been married, then the part or share of every child so dying (including as well any surviving or accruing share or shares as the original share or shares) of and in as well the two said several sums of £—— and £—— Three Pounds per centum Consolidated Bank Annuities, as the said last-mentioned trust monies, stocks, and funds respectively, shall be held upon the same or the like trusts for the benefit of the other or others of the children who shall so die of them the said [*second and third sons*] and [*daughter*], in the same or the like manner, to all intents and purposes, as if the child or children

Clause of survivorship and accruer as to the shares of grandsons dying under twenty-one, and without leaving issue, and granddaughters dying under twenty-one and unmarried.

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argument for restricting the gift to the children whose parents take life interests under the trusts. *Vide ante*, p. 179.

Where property is given to children in expectancy on an absolute life interest of their parents, or either of them, it is superfluous to introduce any express designation of the class of children to be entitled in reference to the period of birth, since the ordinary rule of construction, which lets in all the children coming in esse before the period of distribution (*Vide ante*, p. 182), necessarily includes the whole line of children, as every child must come in esse in the lifetime of his parent; but where (as in the text) the parent's life interest is made determinable on a collateral event, it is proper to prevent, by expressly negativing, the exclusion of children who may happen to be born in the lifetime of the parent subsequently to the determination of the interest of such parent.

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so dying had never been born. And in case any one or more of them the said [*second and third sons*] and [*daughter*] shall die without having any child who shall survive me, and shall, being a male, attain the age of twenty-one years, or shall die under that age leaving lawful issue living at his death, or, being a female, shall attain that age or marry, then the share and interest or respective shares and interests of the child or children respectively so dying shall go and belong to the person or persons who would, at such the decease of any or either of my said sons and daughter so dying as aforesaid, or the decease and failure of his, her, or their child or children, which shall last happen (*h*), be enti-

Gift over of the shares of any of the testator's sons and daughters dying without children.

Remarks upon gifts to next of kin.

(*h*) In framing a trust for next of kin, to take effect on the failure of the objects of a prior trust, or on any other event which may not happen until after the decease of the person whose next of kin are the objects of the trust, it is of importance explicitly to shew, whether the gift is intended to comprehend the persons answering the description of next of kin at the death of the testator, or of other the person whose next of kin are the objects of the trust, or those to whom it applies at the posterior period, when the gift takes effect in possession. The cases on this subject are numerous, and in a few instances conflicting. (*Vide ante*, p. 200; and *Briden* v. *Hewlett*, 2 Myl. & Keene, 90.) The general principles of construction would seem to require, that the gift should be held to embrace next of kin at the earlier period (i. e. the death), unless the contrary can be collected from the terms of the will, and such perhaps may be stated to be the doctrine on the subject; but the grounds upon which this construction has been departed from (the testator being considered to mean next of kin when the gift takes effect in possession) have been often so slight, that great caution is to be exercised in applying such an hypothesis.

The term "next of kin," however, it is conceived, would not be diverted from its ordinary construction, by the fact that such construction would carry the gift to the same persons as had been temporarily presumptive objects of the prior trust, but who did not live to acquire the complete qualification which the testator had annexed to the gift, though in all probability the testator's intention is by this means defeated. For instance, suppose a gift to A. for life, and after her decease, to her children attaining twenty-one years, and in default of such children, to her next of kin: if A. dies, leaving a child who afterwards dies under twenty-one years, such child, though not entitled to take under the trust in favour of children, would come in under the trust in favour of next of kin, unless such trust could be applied to next of kin at the time of the decease of the child of A., which would seem not to be admissible. It

tled as next of kin or otherwise to my personal estate under the statutes made for the distribution of the estates and effects of intestates, and in the same proportions and manner as they would be entitled by virtue of such statutes if I had then died intestate. AND I DO HEREBY EXPRESSLY DIRECT AND APPOINT, that every purchaser of any part of the hereditaments hereinbefore directed or authorized to be sold as aforesaid, and every other person who shall pay any sum or sums of money to the trustees or trustee for the time being of this my will, shall be wholly exempt from all responsibility in respect of the application thereof; [and that every sale which shall be made, and every contract for sale which shall be entered into by the said trustees or trustee for the time being, shall be binding and conclusive on all persons claiming any benefit under this my will, and to all intents and purposes whatsoever (*i*).] PROVIDED ALWAYS, and it is my will, that it shall be lawful for the said trustee or trustees for the time being (the prior life interests hereby created respectively having determined) to apply all or any part of the dividends, interest, and annual income arising from the portion of each and every of my grandchildren respectively of and in the said trust monies, stocks, funds, and premises, during his or her respective minority, in or towards the maintenance, education, clothing, or advancement in the world of such grandchildren respectively, in such manner as the said trustee or trustees for the time being shall think fit. AND ALSO, after the determination of the prior life interest or interests respectively as aforesaid, or with the consent in writing of the person or persons for the time being entitled to such life interest or interests respectively, to advance and pay to and for each, any, or either of my grandchildren respectively, notwithstanding his or her minority, any part not exceeding one half of the then vested or expectant share of each such grandchild, of and in the said trust monies, stocks, funds, and premises, either for placing out any such grand-

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Persons paying trust monies to trustees to be exempt from responsibility.

Power to apply income for the maintenance of grandchildren during minorities.

Power of advancement.

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is obvious, therefore, that the intention of testators is generally best answered by making the trusts in question apply to next of kin when the gift takes effect in possession, rather than to next of kin at the death; but clearness on the point is an advantage of higher value than the comparative eligibility of either of the respective modes of framing the gift.

(*i*) This clause is sometimes unnecessarily added.

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child, being a male, to any profession, trade, or employment, or for the advancement or preferment in the world, or on the marriage of any such grandchild, being either a male or female. [AND FURTHER, that all sums of money which shall be advanced to or for each of the same grandchildren respectively shall be taken and considered as a part of his or her said portion or share, and shall be deducted and allowed out of the same, notwithstanding his or her death before his or her portion shall be absolutely vested in him or her (*k*).]

Unapplied income to be added to principal.

AND FURTHER, that so much of the interest, dividends, and annual produce arising from the portion or share of each of the same grandchildren respectively as shall not be applied for the maintenance, education, and advancement of the grandchild to whom the same portion or share shall belong, shall from time to time be added to the principal monies of the same portion or share, and be improved at interest, together with the same and as a part thereof, by way of compound interest, and follow and be subject to all the limitations, trusts, and dispositions, as well for grandchildren as for other persons hereinbefore expressed concerning the principal of the same portion or share, until the same principal monies, or the securities on which the same shall be invested, shall become payable or transferable, or is or are hereby directed to be paid and transferred; nevertheless, I declare that such accumulated income shall, even after the investment thereof, continue applicable, at the discretion of my trustees, for the maintenance, education, and advancement of the grandchild, from whose vested or expectant share the same shall have arisen.

Power to appoint new trustees.

PROVIDED ALWAYS, and I hereby declare, that in case the said [*trustees*], or either of them, shall die in my lifetime, or shall at my decease renounce the trusts of this my will, or be incapable of accepting the same or acting therein, or in case any trustee for the time being shall, at any time after my decease, die or be desirous of being discharged from the trusts hereof, or shall go to reside beyond the seas, or shall neglect or refuse or become incapable to act in the said trusts before the same shall be fully executed and performed, or shall become bankrupt, or shall take the benefit of any act for the relief

(*k*) This is a useless addition to the clause.

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of insolvent debtors, then, and in any and every such case, and so often as the same shall happen, it shall be lawful for the acting trustee or trustees for the time being under this my will, or, if there shall be no such trustee, then for the executors or administrators of the last acting trustee, or, if there shall be no person answering to such description, or none who shall be willing to act in the premises, then for the renouncing or retiring trustee or trustees to appoint any fit person or persons to supply the place of the trustee or trustees respectively so dying, renouncing, desiring to be discharged, or going to reside beyond seas, or refusing or neglecting, or becoming incapable to act, or becoming bankrupt or insolvent. And I recommend that my friends [*names*] be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship; but I expressly declare that such recommendation shall not be obligatory on the person or persons exercising this present power (*l*) as aforesaid; [and that, immediately after every such appointment, the estates, monies, and effects, which shall then be subject to the trusts of this my will, shall, at the costs of my trust estate, be conveyed, assigned, and transferred, so and in such manner that the same may vest in such new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as the case shall require, and in his, her, or their heirs, executors, administrators, and assigns, upon such of the trusts hereinbefore expressed concerning the same (*m*) as shall be then subsisting or capable of taking effect;] and that every such new

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(*l*) It should be distinctly shewn whether a recommendation of this nature is intended to be obligatory; if so, the clause in the text may be thus varied:—

Trustees directed to nominate certain persons on first vacancies.

"And I direct that my friends [*names*] be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship, and that no other person shall be appointed thereto, unless they respectively shall decline such nomination."

(*m*) The direction to convey, as elsewhere observed, is not an essential part of this clause. The space usually occupied by it would be more usefully filled by a careful and explicit enumeration of the several persons by whom the power is to be successively exercised, in which such clauses are often deficient.

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trustee, either before or after such conveyance or assignment shall be made or executed, shall have and may exercise the same powers, privileges, and authorities of approbation, consent, discretion, and sale, and of giving effectual receipts, and also respecting maintenance, education, and advancement, and all other powers and authorities whatsoever, as if he had been appointed a trustee by this my will, and as if his name had been inserted in this my will, instead of the name of the trustee hereby appointed, in or to whose place such new trustee respectively shall come or succeed. PROVIDED ALWAYS, and I hereby declare, that the executors of this my will, and the trustees for the time being of this my will, shall not be answerable or accountable, any one or more of them, for any others or other of them, or for money received under any receipt in which they shall join only for conformity, and not by any means for involuntary losses; and that every one of them respectively shall be allowed and shall reimburse himself and every other of them all expenses to be occasioned by the due execution of the aforesaid trusts; And I empower my trustees or trustee for the time being to compound for and suspend the enforcement of any claims or demands vested in them or him, and in their or his discretion to pay and satisfy any sum or sums of money claimed to be due or owing to any person or persons from my estate, although such claims and demands may not be supported by strictly legal evidence.

Appointment of executors.

I constitute and appoint the said [*executors*] to be executors in trust of this my will, except as to the leasehold messuage and policies of insurance, so as aforesaid bequeathed to my

Devise of mortgage and trust estates.

said son [*eldest son*]. I GIVE and devise to the said [*executors*], and their heirs, all the estates vested in me as mortgagee or trustee; TO HOLD the same unto and to the use of the said [*executors*], their heirs and assigns for ever, or for all my estate and interest therein, subject nevertheless to the equities and trusts affecting the same respectively, and which at the time of my decease shall be subsisting or capable of taking effect. And hereby revoking every former will by me at any time made, I do declare this writing only to be and contain my last will and testament. IN WITNESS whereof, I, the said [*testator*], the testator, have, to this my last will and testament, contained on —— sheets of paper, set my hand and seal, (to wit), my hand and seal at the top of the first sheet, where the several sheets are affixed to-

gether, and my hand to and at the bottom of the —— succeeding sheets respectively, and my hand and seal to this the —— and last sheet, this —— day of ——, in the year of our Lord one thousand eight hundred and thirty ——.

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Signed, &c. [*Testator.*]

WILL *bequeathing entire* PERSONAL ESTATE *to Testator's* WIFE, *with a* RECOMMENDATION *in favour of his own* RELATIONS, *but so as not to* CREATE *a* TRUST.

TO WIFE ABSOLUTELY, WITH RECOMMENDATION.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE AND BEQUEATH all the personal estate and effects whatsoever and wheresoever, of which I shall be possessed at the time of my decease, or over which I now have any general power of appointment, unto my dear wife [*name*], to and for her own proper and absolute use and benefit; nevertheless, I recommend to the kind and favourable regard of my said wife, such of my own relations as are or may happen to be in indigent and necessitous circumstances; but I expressly declare, that this recommendation shall not have the force or effect of imposing a trust on my said wife, or in any manner abridge or qualify her property and interest in the said personal estate and effects, any rule of equity to the contrary notwithstanding (*a*). AND I DEVISE

Absolute bequest of personalty, with recommendation in favour of certain objects, but so as not to create a trust.

Devise of mort-

(*a*) Words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will create a trust for the person or persons in whose favour the testator's intention is expressed, provided he has pointed out, with sufficient precision and certainty, both the subject-matter and the objects of the intended trust.

Effect of words of recommendation, &c. in creating a trust.

Thus, in the case of *Massey* v. *Sherman*, Amb. 520, where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children as she should appoint.

So, in the case of *Pierson* v. *Garnet*, 2 B. C. C. 38, 226, where a testator gave his residuary personal estate, in trust for A. for life, subject to

TO WIFE ABSOLUTELY, WITH RECOMMENDATION.

to her my said wife all the freehold and copyhold hereditaments whatsoever vested in me as mortgagee or trustee, To HOLD

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gage and trust estates.

certain annuities, and after payment of the annuities, the testator gave the residue to A., his executors, administrators, and assigns, adding, "and it is my dying *request* to the said A., that if he shall die without leaving issue living at his death, the said A. do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper," it was held by Sir *L. Kenyon*, M. R., and afterwards by Lord *Thurlow*, C., that the effect of the will was to create a trust for the descendants in the described event.

Again, in the case of *Malim* v. *Keighley*, 2 Ves. jun. 333, where a testator, in certain events and subject to certain trusts, bequeathed the residue of her personal estate to her surviving daughter, and such bequest was followed by these words, "hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A., and my nephew I., desiring that his reputed daughter, C., may be considered as one of his children." The surviving daughter died without exercising the power, and Sir *R. P. Arden*, M. R., held, that a trust was created in favour of the children of the daughter and nephew.

So, in the case of *Birch* v. *Wade*, 3 Ves. & Bea. 198, where a testator, after giving the residue of his real and personal estate in trust for his wife for life, and then in trust for other persons for life, and after disposing of two thirds absolutely, added—"It is my will and desire, that the other third part of the principal of my estate and effects be left entirely at the disposal of my dear and loving wife among such of her relations as she may think proper." The wife died without making any disposition, and Sir *W. Grant*, M. R., considered it to be clear that the testator intended that his wife's relations should have the benefit of the disposition. Her next of kin at her death, therefore, were held to be entitled. See also *Brest* v. *Offley*, 1 Ch. Rep. 246; *Eales* v. *England*, Pre. Ch. 202; *Macey* v. *Shurmer*, 1 Atk. 389; *Harding* v. *Glyn*, 1 Atk. 469; *Earl of Bute* v. *Stuart*, 2 Eden, 87; S. C. 1 B. P. C. Toml. ed. 476; *Paul* v. *Compton*, 8 Ves. 380; *Wright* v. *Atkins*, 19 Ves. 299; *Cary* v. *Cary*, 2 Sch. & Lef. 189; *Forbes* v. *Ball*, 3 Mer. 441; *Prevost* v. *Clarke*, 2 Madd. 458; *Horwood* v. *West*, 1 Sim. & Stu. 387.

Expressions which have been held not to create a trust.

But if the testator's language amounts merely to an expression of general kindness towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds—"I have no doubt but my wife (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest. *Buggens* v. *Yeates*,

the same unto and to the use of my said wife, her heirs and assigns for ever, subject nevertheless to such equities and

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8 Vin. Ab. 72, pl. 27. And the same construction has prevailed in some instances in which the indefiniteness was of a less palpable character, as where a testator gave leasehold estates at S. to his brother, J. H., for ever, "hoping he will continue them in the family." *Harland* v. *Trigg*, 1 B. C. C. 142.

So, the following words added to a residuary gift to the testator's wife, "not doubting but that she will dispose of *what shall be left* at her death to our two grandchildren," were held by Lord *Thurlow* not to create a trust, on account of the uncertainty to what extent, if at all, the testator intended to control the absolute property of the wife. *Wynne* v. *Hawkins*, 1 B. C. C. 179; see also *Eade* v. *Eade*, 5 Madd. 118; but see *Surman* v. *Surman*, Ib. 123.

But where the testator ordered and directed his son Joseph (to whom he gave all his real and personal estate) to take care of and provide for his (the testator's) daughter Anne, during her life—Sir *T. Plumer*, M. R., was of opinion that the daughter was entitled to have a provision made for her out of the residue, in addition to an annuity of 5*l.*, which was bequeathed to her. *Broad* v. *Bevan*, 1 Russ. 511, n.

Recent cases suggest a doubt whether a similar decision would now be made on such words; for the Courts seem to be sensible that they have gone far enough in investing with the obligatory efficacy of a trust loose expressions of this nature, which, in all probability, are rarely, if ever, intended to have such an operation. Accordingly, we find, of late, a more positive and uniform requisition of definiteness, in regard to the subject and objects in the testator's contemplation, than appears in some of the earlier adjudications.

Thus, where a testator gave all his real and personal estate to his wife, trusting that she would, in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor—Sir *J. Leach*, V. C., held the wife to be absolutely entitled, the testator's intention evidently being to leave the children dependent on her. *Curtis* v. *Rippon*, 5 Madd. 434.

So, where a will contained the following passage—"I do likewise will and bequeath to my only son, J., the sum of £60 sterling per year for ever; also to provide for the two daughters of my child, H. E., namely, S. E. and E. E., and the remainder of my property to the two children of my daughter, S. A."—Lord *Gifford*, M. R., held, that the words in question did not create a trust on the £60 a year, or the remainder of the property bequeathed to the children of S. A., the former being a distinct,

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trusts as for the time being shall or may affect the same hereditaments respectively. And I empower my said wife, by any

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independent bequest; and in regard to the latter, though the testator no doubt intended to make a provision for the daughters of H. E., yet the Court had no means of determining what that provision was to be. *Abraham* v. *Alman*, 1 Russ. 509.

Again, where a testator bequeathed the remainder of what he should die possessed of, after payment of debts and legacies, to his dear wife, adding, "recommending to her, and not doubting, as she has no relations of her own family, but that *she will consider my near relations*, should she survive me, as I should consider them myself in case I should survive her." In a preceding part of the will, the testator had assigned as a reason for his not leaving his brother and sister any thing, that they were provided for, and that he could not do so without taking from his wife's property, who was more in need of it—Sir *A. Hart*, V. C., held, that the effect of the whole was, that no trust for the relations was created. *Sale* v. *Moore*, 1 Sim. 534.

So, where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, *unfettered and unlimited*, in full confidence and with the firmest persuasion, that, in her future disposition and distribution thereof, she would distinguish the heirs of his late father, by devising and bequeathing the whole of his said estate, together and entire, to such of his said father's heirs as she might think best deserved her preference—it was held in the House of Lords, confirming a decree in the Exchequer, that the wife was absolutely entitled for her own benefit, Lord *Eldon* considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord *Redesdale*) on the words "unfettered and unlimited." Lord *Eldon* also adverted to the great difficulty of reconciling the testator's direction, that the estate should go "entire," with his direction respecting its "distribution." *Meredith* v. *Heneage*, 1 Simons, 542.

Again, where a testator bequeathed certain annuities, to be paid out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the dividends to his brother, A., (to enable him to assist such of the children of the testator's deceased brother, F., as he might find deserving of encouragement), to be paid to the several persons as they became due—Sir *L. Shadwell*, V. C., decided that the words in the parenthesis did not raise any trust in favour of the children of F.; they merely expressed the motive or cause of the gift: and his Honour commented on other pas-

deed or deeds, to be attested by one witness or more, to limit and appoint the said hereditaments respectively to such uses, for such estates and in such manner, as she the said [*wife*], in the execution of, and without prejudice to the trusts and equities aforesaid, shall think proper. And I appoint my said wife executrix of this my will, and revoke all former wills by me at any time made. IN WITNESS, &c.

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sages of the will, which fortified this conclusion. *Benson* v. *Whittam*, 5 Sim. 22.

And lastly, and still more recently, where a testatrix made a codicil to her will in the following words—"I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it amongst all my children. If they die single, of course *they will leave what they have amongst their brothers and sisters, or their children.*" Sir *J. Leach*, M. R., considered that these words were not intended to create an obligation upon the two eldest daughters; as they applied not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gave by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount. *Lechmere* v. *Lavie*, 2 Myl. & Kee. 197.

Such is the long train of decisions which have been produced by the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation on the devisee or legatee to whom they are addressed, and those which are intended merely to onerate him with a moral or conscientious duty. After such a statement, it may appear superfluous to injoin caution in the use of words, which have occasioned so much litigation. If a trust is intended to be created, this should be done in plain and unequivocal terms; and if not, any expressions of request or exhortation, which the testator may wish to introduce, should be invariably accompanied (as in the text) by an express and unambiguous declaration, that no trust or obligation is intended to be imposed.

Remarks upon the cases.

OF REAL AND PERSONAL ESTATE.

WILL *of* REAL *and* PERSONAL ESTATE *of a Testator having a* WIFE, *one* SON, *and* SEVERAL DAUGHTERS. BEQUEST *of* PERSONALTY *to* WIFE (*except* MONEY *in the* FUNDS), *exempt from* DEBTS *and* LEGACIES. PECUNIARY LEGACY *to Testator's* SON, *payable at Twenty-two, Interest in the meantime to be applied for* MAINTENANCE, *with Power to apply* PRINCIPAL *for his* ADVANCEMENT. ADDITIONAL LEGACY *to* SON, *payable at* DEATH *or* MARRIAGE *of* WIFE. LEGACIES *to* DAUGHTERS, *vested at Testator's Decease, but payable at* WIFE'S DEATH *or* MARRIAGE, *unless they marry in her Lifetime, in which case* HALF *of Legacies to be raised with Wife's consent, and to be* PAID *or* SETTLED *as* TRUSTEES *and* WIFE *think proper. Other Legacies (including one to Trustees for their Trouble), payable immediately.* DEVISE *of* FREEHOLD ESTATES *to* TRUSTEES, *Upon Trust for* SALE. POWER *of* SALE *of* COPYHOLDS. *Out of the Proceeds of Freeholds and Copyholds, Trustees to pay* DEBTS *and* LEGACIES, *and* INVEST SURPLUS, *and out of Income to pay* TWO LIFE ANNUITIES, *and* RESIDUE *to* WIFE DURING WIDOWHOOD; *and after her Death or Marriage, to pay* LEGACIES *to Testator's* CHILDREN, *the Legacy of one of the Daughters (feme covert), to be for her* SEPARATE USE *during her Life, and after her Death for her* CHILDREN, *and in Default of* CHILDREN, *In trust for Testator's* OTHER DAUGHTERS *absolutely. Another* LEGACY *is given to* SUCH *of Testator's* CHILDREN *and their* ISSUE *as* WIFE *shall* APPOINT, *and in Default and as to* RESIDUE, *In trust for* CHILDREN, *in equal Shares. In case of Funds being insufficient to pay Legacies in full, Deficiency to fall on certain Legacy, and if that should*

be insufficient, certain other LEGACIES *to* ABATE *pari passu.* PROVISION *for Wife to be for* MAINTENANCE *of* HERSELF *and also of* DAUGHTERS *until Marriage.* POWERS *to* TRUSTEES *to* CHANGE SECURITIES. DEVISE *of* MORTGAGE *and* TRUST ESTATES. POWER *to* APPOINT NEW TRUSTEES. INDEMNITY *to Trustees. (Variation, introducing Power to Trustees to* PURCHASE ANNUITIES *for Legatees, in Substitution for those bequeathed.)*

OF REAL AND PERSONAL ESTATE.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE AND BEQUEATH unto my dear wife [*name*], all my ready money, money in the hands of my banker, goods, chattels, personal estate and effects, of what nature or kind soever and wheresoever (except monies in the public funds or upon government or real securities), of which I shall be possessed, or to which I shall be entitled, at the time of my decease. And I hereby, so far as I lawfully or equitably may or can, exempt and discharge the personal estate so bequeathed to my said wife as aforesaid of and from the payment of my debts, funeral and testamentary expenses, and the several legacies (whether consisting of annual or gross sums) hereinafter by me given and bequeathed (*a*). I GIVE AND

Bequest of personal estate to wife (except money in the funds and real securities) discharged of debts and legacies.

Legacy to tes-

(*a*) Among the testamentary obscurities which have from time to time created litigation and perplexed Judges, the neglect explicitly to declare whether a charge of debts and legacies on real estate is intended to exonerate the personalty, or to provide merely an auxiliary fund, holds a conspicuous place; and the inquirer into the subject will find himself embarrassed at every step of his progress towards general and satisfactory conclusions, by a multitude of petty distinctions. He will indeed soon perceive, that a mere charge on the realty does not, *per se*, exonerate the personal estate, which continues to be the primary fund. It will also be apparent, that the cases agree in the position, that, in order to exempt the personalty, there must be either express words, or "demonstration plain," "manifest intent," or "necessary implication," to be collected from the whole will; but what amounts to such an indication of intention as will satisfy these significant words, is a species of knowledge accessible only to him who will undergo the labour of consulting some forty or fifty cases, from the perusal of which he will rise,

Necessity of explicitness as to personalty being exempt from debts and legacies.

OF REAL AND PERSONAL ESTATE.

tator's son, to be vested at twenty-two, and the interest in the meantime to be applied for maintenance, with power to apply principal for his advancement.

BEQUEATH unto my son [*name*] the sum of £—— sterling money of Great Britain and Ireland, to be paid to and to be an interest vested in him at his age of twenty-two years, and not before. And I direct, that interest on the said sum, after the rate of 5*l.* per centum per annum, shall in the meantime, from my decease until my said son shall attain the age of twenty-two years, or die under that age, be paid and applied to and for the maintenance, education, and support of my said son. And I further direct, that it shall be lawful for the trustees or trustee for the time being of the fund hereinafter provided for the payment of the said legacy of £——, with the consent of my said wife, to be testified by writing under her hand; but if my said wife shall be then dead, in the proper discretion of my said trustees or trustee for the time being to advance and pay the said sum of £——, or any part thereof, for the apprenticing or putting him the said [*son*] to any business, profession, or employment, or establishing or placing him therein, or otherwise for his benefit or advancement in the world, notwithstanding that he shall then be under the age of twenty-two years.

Second legacy to the son to be vested at the age of twenty-four, but not payable till the death or marriage of wife.

AND I HEREBY GIVE AND BEQUEATH to my said son [*name*], the sum of £—— sterling money of Great Britain and Ireland, in addition to the said legacy hereinbefore bequeathed to him. And I direct that the said legacy of £—— shall be an interest vested in my said son at his age of twenty-four years, and not before, and shall be paid to him without interest on his attaining that age, if the same shall happen after the decease or marriage of my said wife; But if the same shall happen during her widowhood, then the raising and payment of the said legacy of £—— shall be postponed till after the decease or marriage of my said wife, whichever shall first happen.

Legacies to unmarried daughters to vest at testator's decease, but payable at the death or marriage of the wife. In case any marry, then one half to be raised

I GIVE AND BEQUEATH unto each of my five daughters [*names*], or such of them as shall be living at the time of my decease, the sum of £—— of sterling money of Great Britain and Ireland. And I direct that my said five daughters shall have vested interests in their respective legacies immediately upon my

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if not fully satisfied with the result of the authorities, yet at least deeply impressed with the importance of explicitness on the point—a lesson which it is the design of these remarks to inculcate. See cases as to the exemption of personalty from debts and legacies, collected 2 Jarm. on Devises, 681.

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decease; But the payment thereof, and without interest in the meantime, shall be postponed till after the decease or marriage as aforesaid of my said wife. PROVIDED ALWAYS, that in case any of my five daughters hereinbefore named shall happen to marry during the widowhood of my said wife, with the consent and approbation of her or their guardian or guardians for the time being, then it shall be lawful for the trustees or trustee for the time being of the trust fund hereinafter provided for the payment of the said several legacies of £—— each during the widowhood of my said wife, with her consent and by her direction (testified by writing under her hand), to raise for and pay to each such daughter so marrying as aforesaid one moiety or half part of her said legacy of £——, for her use and benefit. PROVIDED ALSO, and I hereby further declare, that it shall be lawful for the said trustees or trustee for the time being, and my said wife, if they shall think proper, to settle the said moiety of the legacy or respective legacies, the payment whereof shall be accelerated under this present provision, of any daughter or daughters of mine, so as aforesaid marrying during the widowhood of my said wife, Upon trust for the benefit of such daughter or daughters, and her or their intended husband or husbands, and the issue of such marriage or marriages, or for the benefit of some one or more of such objects, in such manner in all respects, and with such accompanying powers and provisions as my said wife and trustees (either with or without the concurrence of such marrying daughter or daughters), shall think proper. And I direct and declare, that my executors or trustees for the time being, upon their paying or transferring to the trustees or trustee of any settlement or settlements to be made as aforesaid, the moiety so settled of the legacy or legacies of such daughter or respective daughters of mine marrying as aforesaid, shall be exonerated and discharged from all further responsibility in respect thereof. AND I GIVE AND BEQUEATH unto my brother [*name*], the sum of £—— sterling, to be paid as soon as convenient after my decease, such legacy, if not paid within six calendar months, thenceforth to carry interest at the rate of 4*l.* per centum per annum. AND I GIVE AND BEQUEATH unto my friends [*trustees*], of ——, the sum of £—— apiece, to be paid or retained by them as soon as convenient after my decease, for the care and trouble which they

during the wife's life, with her consent.

Power to wife and trustees to settle moiety of legacies of daughters marrying during widowhood of wife.

Legacy to testator's brother.

Legacies to the trustees for their trouble.

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will respectively be at, in, or about the execution of the trusts hereby in them reposed. AND I HEREBY GIVE AND DEVISE unto the said [*trustees*], their heirs and assigns, all my freehold manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, in possession, reversion, remainder, or expectancy, (except the hereditaments vested in me as mortgagee or trustee); TO HOLD the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, UPON TRUST, nevertheless, that they the said [*trustees*], or the survivors or survivor of them, or the heirs of such survivor of them, or other the trustees or trustee for the time being of this my will, to be appointed as hereinafter mentioned, shall and do, with all convenient speed after my decease, absolutely sell and dispose of my said freehold hereditaments, either together or in parcels, and either by public auction or private contract, and shall and do make and execute such conveyances and assurances of the hereditaments which shall be so sold, as shall be requisite or proper for carrying into effect such sales and dispositions respectively. AND I DIRECT AND DECLARE, that until the said hereditaments shall be sold under the trust for sale hereinbefore contained, it shall be lawful for the said trustees or trustee for the time being to let and demise the same, or so much thereof as for the time being shall remain unsold, or any part of the same, at rack rent, either from year to year or for any term or number of years, not exceeding twenty-one years in possession, and with, under, and subject to such covenants and agreements as the said trustees or trustee shall think proper. AND I DECLARE, that the rents and profits arising from the said hereditaments, from the day or time of my decease until the sale thereof, shall from time to time (after payment thereout of the costs of fire insurance and repairs and other outgoings) be paid and applied in the same or the like manner in all respects as the annual income arising from the monies to be produced by the sale of such hereditaments would have been payable and applicable, by virtue of the trusts hereinafter contained, if such sale had been made. AND I FURTHER DIRECT AND DECLARE, that it shall be lawful for the said [*trustees*], or the survivors or survivor of them, or the heirs of such survivor, or other the trustees or trustee for the time being of this my will, to make sale and absolutely dispose of my copyhold messuage or tenement, situate at ——,

Devise of freeholds to trustees to sell.

Power to lease until sale.

Application of rents until sale.

Power to sell copyholds.

in the county of ——, held of the manor of ——, with the appurtenances and the inheritance in fee simple thereof, either by public sale or private contract, and to make and execute such conveyance or assurance or conveyances and assurances as shall be requisite or proper for carrying such sale and disposition into effect; provided nevertheless, and so that such sale and assurance or assurances of the said copyhold hereditaments be made and executed during the lives of my executors, or the lives or life of the survivors or survivor of them, or within twenty-one years after the decease of such survivor (*b*). AND I DIRECT AND DECLARE, that, until the sale and assurance of my said copyhold hereditaments by virtue of the aforesaid power, it shall be lawful for the said trustees or trustee for the time being to enter into the possession of and receive the rents and profits arising from the said hereditaments, which said rents and profits (after payment thereout of the costs of fire insurance, and repairs, and other outgoings) shall and may, from the day or time of my decease, be paid and applied in the same or the like manner in all respects as the annual income to arise from the money to be produced by the sale of the said hereditaments would have been payable and applicable, by virtue of the trusts hereinafter contained, if such sale had been made. AND I FURTHER DIRECT AND DECLARE, that the receipts of the trustees or trustee for the time being of this my will for the purchase monies, rents, and profits, to be received by them or him by virtue of the trusts and powers respectively hereinbefore contained shall be valid and effectual discharges to the persons paying the same monies; and that such persons respectively, or any of them, shall not be answerable or accountable for the application of the same monies, or any part thereof. AND I FURTHER DIRECT AND DECLARE, that, in the exercise of the said trust for sale and power of sale respectively, it shall be lawful for the said trustees and trustee for the time being to buy in any part of the hereditaments offered for sale at

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Application of rents of copyholds until sale.

Trustees' receipts to discharge purchasers.

Discretionary power to trustees to buy in at auctions, sell under restrictions, and rescind contracts.

(*b*) It will be obvious to the learned reader, that the copyholds are not included in the devise of the freeholds, in order that the trustees may be enabled to confer a title on a purchaser without being admitted, (*Vide ante*, Vol. 8, p. 60), and that the power of sale is restricted in regard to the period of its exercise, for the purpose of keeping it within the limits prescribed by the rule against perpetuities. *Vide ante*, p. 37.

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any auction, and also, if deemed expedient, to sell any part of the hereditaments hereby made saleable, under and subject to any restrictions and stipulations relative to the title or evidence of title to be required by any purchaser; and also, in the discretion of the said trustees or trustee, to rescind or vary any contract for sale that may have been entered into. And as to, for, and concerning the monies to arise from and be produced by the sale of the said freehold and copyhold hereditaments hereinbefore made saleable, I direct and declare, that the said trustees and trustee for the time being shall and do, by, with, and out of the same monies, in the first place retain and pay the costs and expenses of preparing for and making such sale or sales, and all my just debts, funeral and testamentary expenses; and shall and do, in the next place, pay, retain, and satisfy such of the several legacies hereinbefore by me bequeathed, as shall have become due and payable, when and as the same respectively shall so become due and payable; and shall and do lay out and invest the surplus of the monies to arise by such sale or sales as aforesaid, in the names or name of the said trustees or trustee, in some or one of the public stocks or funds or other government securities of Great Britain, or upon real securities in England; and shall and do stand possessed of and interested in all and singular the said stocks, funds, or securities, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. And I HEREBY GIVE AND BEQUEATH all and every the shares and sums of money in the public stocks or funds or other government securities of Great Britain, or upon real securities of or to which I shall die possessed or in any wise entitled, unto the said [*trustees*], their executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. And as to, for, and concerning, as well the stocks, funds, or securities in or upon which the surplus of the monies to arise by such sale or sales as aforesaid shall from time to time be invested, as also the said stocks, funds, and government and real securities, of or to which I shall die possessed or entitled, I hereby direct that the trustees or trustee for the time being of this my will shall and do stand possessed of and interested in the same respectively, upon and for the trusts, intents, and purposes hereinafter declared concerning the

Declaration of trusts of purchase monies.

Bequest of government and real securities,

Funds purchased and bequeathed to be held upon the following trusts.

same, that is to say, UPON TRUST, from time to time during the life of my mother [*name*], by, with, and out of the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities, to pay to her one annuity or clear yearly sum of £——; And during the life of my sister [*name*], to pay to her one annuity or clear yearly sum of £——; such annuities to be paid to the said annuitants respectively free of legacy duty and all other deductions whatsoever, in equal portions half-yearly, on the —— of ——, and the —— of ——, in each year, the first of such payments to be made on such of the said days as shall happen next after my decease. AND, subject to the payment of the said several annuities, UPON TRUST to permit and suffer my said wife [*name*], to receive and take the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities during the term of her natural life, or until she shall marry again. AND from and after the decease or marriage of my said wife, which shall first happen, UPON TRUST that the said trustees or trustee for the time being shall and do, by, with, and out of the said trust monies, stocks, funds, and securities, or by sale, transfer, or other disposition thereof, or of an adequate part or parts thereof (but without prejudice to the aforesaid annuities of £—— and £——), levy and raise so much money as will be sufficient to pay and satisfy the said several legacies hereinbefore by me bequeathed and made payable on the decease or marriage of my said wife as aforesaid at the respective times and in manner hereinbefore appointed for payment thereof; and also shall and do, by, with, and out of the said trust monies, stocks, funds, and securities, or by transfer or sale of an adequate part or parts thereof, levy and raise the sum of £—— sterling, and shall and do lay out and invest the same in their or his names or name in some or one of the public stocks or funds of Great Britain, or upon real securities in England, UPON TRUST, nevertheless, from time to time to pay the interest, dividends, and annual produce thereof to my daughter [*name*], the wife of ——, during her life, for her own sole and separate use, independently of and without being subject to the debts, control, or engagements of her present or any future (*c*) husband, and so that the said [*married daughter*]

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Upon trust to pay life annuities to testator's mother and sister,

and to pay the residue of income to wife for life or widowhood.

After her death or marriage, to raise and pay the other legacies, and to raise another legacy for one of testator's daughters (feme covert) for her separate use during her life, and after her death;

(*c*) But see note, *post*, and Index to this volume, title "Separate Use."

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shall have no power to alien or anticipate the said interest, dividends, and annual produce, or any part thereof; and after her decease, then as to the last-mentioned stocks, funds, and securities, IN TRUST for such child or children of my said daughter [*married daughter*], lawfully begotten or to be begotten, as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, and if more than one, to be equally divided between or among such children, share and share alike; the annual income arising from the expectant or presumptive share of any and every child, who, at the decease of my said daughter [*name*], shall not have acquired a vested interest therein, to be applied in such manner as the said trustees shall think proper for the maintenance of such child, notwithstanding that his or her father shall be living and of ability to provide such maintenance. And if there shall be no child of my said daughter who shall live to acquire a vested interest in the said legacy, then I direct that the said sum of £——, and the stocks, funds, and securities whereon the same shall be invested as aforesaid, shall sink into and be considered as part of the residue of the stocks, funds, and securities whence the same shall have arisen or been raised. And subject to the raising and paying of the said several annuities and legacies hereinbefore mentioned and directed to be raised and paid, UPON TRUST, that the trustees or trustee for the time being of this my will shall and do, from and after the decease or marriage of my said wife, which shall first happen, by transfer, sale, or other disposition of an adequate part or parts of the said trust monies, stocks, funds, and securities, levy and raise the sum of £—— sterling, or so much thereof as the said trust monies, stocks, funds, and securities will extend or be sufficient to raise, and shall and do pay the same sum of £——, or so much thereof as shall be produced by the said trust monies, stocks, funds, and securities as aforesaid, unto and amongst all and every, or such one or more of my children, or the issue of any of such children (whether the parents or ancestors of such issue shall be living or dead), at such times and in such shares and proportions, and with such restrictions and such limitations over to and in favour of some or one or more of the said child or children or issue, as she my said wife, at any time during her widowhood, by any deed or instru-

In trust for the children of daughter.

Also to raise £——, and subject thereto,

In trust for testator's children and their issue, as wife during her widowhood shall by deed or will appoint.

ment in writing, under her hand and seal, and with or without power of revocation and new appointment, or by her last will and testament, or any codicil or codicils thereto, shall direct or appoint (*d*). AND as to, for, and concerning, as well the said sum of £—— lastly mentioned, in case no such direction or appointment shall be made thereof as aforesaid, or so much thereof of which no such direction or appointment shall be made, as also as to, for, and concerning the surplus, if any such shall remain, of the said trust monies, stocks, funds, and securities, after the purposes aforesaid shall be fully answered and satisfied, IN TRUST for all and every the child and children of me the said [*testator*], who shall be living at the time of my decease, in equal shares, to be an interest vested in each such child immediately on my decease. PROVIDED ALWAYS, and I hereby direct and declare, that in case the monies to arise by the sale of the real estate hereinbefore by me made saleable, and the public stocks, funds, government and real securities, of or to which I shall die possessed or entitled as aforesaid, shall not, after payment thereout of my debts and funeral and testamentary expenses, be sufficient to pay and satisfy the whole of the several legacies and annuities hereinbefore by me directed to be paid thereout (*e*) as aforesaid, then

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And as to the residue, and in default of appointment also as to the £—, In trust for testator's children equally.

In case the funds for the payment of legacies shall not be sufficient, one legacy to bear deficiency, and if unsufficient, certain other legacies to abate proportionally.

(*d*) Where children take vested interests in a reversionary fund, of which the income is given to their parent for life, it is often expedient to reserve to the latter a power of varying the shares, as well for the purpose of securing to the donee a wholesome degree of parental influence, as of enabling him to adjust the disposition to the exigencies of the respective objects, and introducing such modifications as circumstances may require; and it has another advantage, not often considered, *that it checks the children in the disposal of their reversionary interests;* for a vested share which is liable to be cut down or wholly defeated by an appointment, of course is not a marketable commodity. Who, that knows any thing of the nature of reversionary bargains, will deem this to be a trivial advantage?

Advantage of giving to a parent the power of regulating the reversionary shares of children.

(*e*) Where a testator has bequeathed legacies, payable at different periods out of a fund of indefinite amount, some of which will become payable before it can be known whether the produce of the fund will be sufficient to pay all the legacies in full, it is convenient to give to the legatees priority according to the prescribed order of payment; otherwise the executors are compelled either to suspend the payment of all the legacies until the net produce of the fund has been ascertained (which

As to the priority and order of payment of legacies.

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the deficiency shall wholly fall upon and be satisfied out of the legacy of £—— hereinbefore bequeathed to my said

seems contrary to the intention), or else to take security from the legatees to refund, which is generally attended with inconvenience and expense.

Priority among legatees not conferred by certain expressions.

The ordinary expressions, in a will descriptive of the order of paying pecuniary legacies, are not considered to denote an intention to vary or disturb the equality, which, by the general rule of equity, obtains among legatees of any given class. This was shewn in some clear general propositions by Sir *J. Leach*, V. C., in the case of *Beeston* v. *Booth*, 4 Madd. 161. "The expressions, 'in the first place I give to A., then to B.,' are not evidence of such intent (i. e. an intent to depart from the general rule); for they mark only the order in which it occurred to the testator to name the objects of his bounty. A gift to A., payable at one month after my decease, to B. at six months, and to C. at twelve months, are not evidence of such intent; for, although to be paid at different times, the presumed intention remains, that they are all equally to be paid at those times. The expressions—'In the first place I direct that my executors shall pay to A., then to B., then to C.,' are not evidence of such intent; for they mark only the order in which it occurs to the testator to give the directions to his executors. The expressions—'I direct that my executors shall in the first place pay to A., in the next place to B, then to C.,' are not evidence of such intent, because they do not necessarily import more than the order of payment: that A. shall be paid by my executors in the first place, or out of the first monies which they have applicable to the payment of legacies; B. in the next place, or next in order; and then, or next in order, C.; and these expressions are therefore consistent with the presumed intention, that all shall be equally paid in their order." See also *Vintner* v. *Pix*, 1 Ch. Rep. 133; *Brown* v. *Allen*, 1 Vern. 31; *Lewis* v. *Lewis*, 2 Ves. sen. 417; *Blower* v. *Morret*, Id. 420.

Legacies to servants, &c.

It has been also decided, that legacies to servants, *Attorney-General* v. *Robins*, 2 P. W. 25; *Alton* v. *Medlicott*, cit. 2 Ves. sen. 417; to executors, though given for their care and trouble, *Heron* v. *Heron*, 2 Atk. 171; or to friends for the purchase of mourning rings, *Apreece* v. *Apreece*, 1 Ves. & Bea. 364, (all which a testator would commonly wish to exempt from deduction), are equally within the general rule, and subject to abatement proportionally with other legacies; and annuitants cannot claim precedence over legatees of gross sums. *Hume* v. *Edwards*, 3 Atk. 693.

Legacies in consideration of legatee's relinquishing some benefit.

But where a legacy is something more than mere bounty (being founded on a valuable consideration moving from the legatee); as where it is given upon the condition of his renouncing some claim upon the testator's estate, the legatee is not liable to abate *pari passu* with those whose gifts flow only from the spontaneous bounty of the testator. On this

children (subject to the power of appointment of my said wife), and in case such deficiency shall exceed the amount of the last-mentioned legacy, then I declare that one moiety or half part (being the moiety over which the power of settlement hereinbefore contained does not extend) of the several legacies of £—— a piece hereinbefore bequeathed to my said unmarried daughters, and the said legacy of £—— bequeathed to or in trust for my said daughter [*married daughter*] and her children, shall respectively abate in proportion to the respective quantums or amounts thereof, but the other legacies hereby bequeathed shall be paid in full (*f*). And I

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principle it has been often decided, that a widow, to whom a pecuniary legacy is bequeathed in lieu of dower, is entitled, on a deficiency of assets, to be paid in preference to other legatees of the same class; *Burridge* v. *Bradyl*, 1 P. W. 127; and this advantage extends to the entire legacy, although it may exceed, and however largely it may exceed, the value of the dower. *Davenhill* v. *Fletcher*, Amb. 244. But the legatee must have a valid legal claim subsisting at the death; and accordingly, where a testator bequeathed to certain creditors who had accepted from him a composition of ten shillings in the pound, sums equal to the residue of their debts, it was held that the sense of moral obligation, which had induced this act, did not confer on the legatees any superiority of claim over other voluntary claimants under the same will. *Coppin* v. *Coppin*, 2 P. W. 292.

Convenience of enabling trustees to purchase annuities in certain cases.

(*f*) It often happens that the distribution of a residue is protracted by the continuance of small annuities payable out of the income: such would be the case in the present instance, if the testator's mother and sister, or either of them, should be living at the death or marriage of his wife, when the distribution of the residue would, but for the annuities, take place. The best mode of guarding against this inconvenience seems to be, to authorize the trustees under such circumstances to purchase a government or other life annuity for the legatee in lieu of the one given by the will. The difference between the clause in the text and that which occurs in a former precedent (*ante*, p. 252), is, that *there* the purchase is to be made absolutely, and in the first instance, (the general residue out of which the annuity is payable being distributable in regard to some of the legatees instanter); while *here* the annuities are only to be purchased in certain events. The clause adapted to the precedent in the text will be as follows:—

Clause authorizing trustees in a certain

"Provided always, and I hereby declare, that if my said mother and sister, or either of them, shall be living at the

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further direct and declare, that none of the legacies to my children (included in the last-mentioned class) shall be paid until full and adequate provision shall have been made for the payment of the annuities of £—— and £—— hereinbefore bequeathed. PROVIDED ALWAYS, and I hereby declare, that the yearly income or provision hereinbefore by me given to or made for my said wife during her widowhood as aforesaid, was and is sogiven and made for the maintenance, support, and mutual benefit of herself and my daughters, or such of them as shall for the time being be living and unmarried, and until their respective marriages in the lifetime of my

Provision made for the wife to be for the maintenance of herself and daughters until their marriage, with direction as to what each daughter may claim for her maintenance.

decease or marriage again of my said wife, so that the continuance of the annuities or annuity hereinbefore given to them or her shall become an obstruction or impediment to the complete and final distribution of the stocks, funds, and securities, the income whereof is charged with the payment of the said annuities or annuity respectively, then and in such case it shall be lawful for my said trustees or trustee, if they or he shall deem it expedient so to do, to apply an adequate portion of such stocks, funds, and securities, in the purchase for my mother and sister respectively, or such of them as shall be then living, of one or more life annuity or annuities (as the case may be), equal in amount to the annual sum or sums hereby directed to be paid to her or them respectively; such purchase to be made from the British government or some corporate body or bodies, or from some individual or individuals, who shall secure the same by powers of distress and entry upon lands or other hereditaments; and when and immediately after the annuity or respective annuities so purchased shall commence, the annual sum or sums hereby bequeathed to my said mother and sister respectively, or such of them as shall be living as aforesaid, shall absolutely cease, any thing hereinbefore contained to the contrary notwithstanding. And I declare, that the said annuitants, or either of them, or their or her personal representatives, shall not be at liberty to elect to take and receive in lieu of the annuities or annuity so as aforesaid directed to be purchased, the price or value thereof, any rule of equity to the contrary notwithstanding *.

event to purchase annuities.

* *Vide ante*, p. 253.

said wife; but so, nevertheless, that no such last-mentioned daughter shall, previously to her attaining the age of twenty-one years, be entitled at law or in equity to have or claim the payment or expenditure, by and out of the said annual income or provision of my said wife, of more than the annual sum of £—— for her maintenance, support, or benefit, and that no such daughter, having attained the age of twenty-one years, shall be entitled at law or in equity to have or claim, by and out of the said annual income or provision, more than the annual sum of £—— for her maintenance, support, and benefit. And I expressly declare, that it shall not be incumbent on my trustees or trustee to see to the due application of the sum or sums of money which ought to be applied by my said wife to the purposes and in the manner aforesaid. OF REAL AND PERSONAL ESTATE.

PROVIDED ALSO, and I hereby direct and declare, that it shall be lawful for the trustees or trustee for the time being of this my will, at any time or times, to sell, transfer, and dispose of all or any of the stocks or funds, and to call in the securities which for the time being shall be vested in them or him upon any of the trusts aforesaid, or any part thereof, and to lay out and invest the monies to arise therefrom in the names or name of the said trustees or trustee, in the parliamentary stocks or public funds or other government securities of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates or other real securities in England, to be from time to time in like manner altered and varied when and as often as occasion shall require. [And I do hereby direct, that the said trustees and trustee for the time being shall stand possessed of and interested in all such new or other stocks, funds, and securities as aforesaid, and the interest, dividends, and yearly produce thereof, upon the same trusts and for the same intents and purposes as are hereinbefore by me declared concerning the trust premises, in lieu of which the same shall be so substituted as aforesaid, and the interest, dividends, and yearly produce thereof, or as near thereto as the deaths of the parties and other circumstances will permit (*g*)]. PROVIDED ALSO, and I further direct and declare, that all and every person and persons

Power to change securities.

Exoneration to persons paying trust monies.

(*g*) This is a usual but of course not an essential appendage to the clause.

OF REAL AND PERSONAL ESTATE.

Devise of mortgage and trust estates.

who shall pay any sum or sums of money, or transfer any stocks, funds, or securities to the trustees or trustee for the time being of this my will, shall be wholly and absolutely exempt from all responsibility in respect of the application thereof. AND I HEREBY GIVE AND DEVISE unto the said [*trustees*], and their heirs, all the freehold and copyhold estates vested in me as mortgagee or trustee; TO HOLD the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, or for all my estate and interest therein, subject to the equities and upon and for the trusts affecting the same estates respectively, or such of them as at the time of my decease shall be subsisting or capable of taking effect; UPON TRUST, nevertheless, to apply and dispose of any sum or sums of money to be received by the said trustees by virtue of any mortgage or mortgages belonging to me beneficially, for the intents and purposes hereinbefore declared concerning the same. PROVIDED ALWAYS, and I hereby declare, that in case the before-named trustees, or any of them, or any other trustee or person named as trustee for the time being of this my will, shall die in my lifetime, or shall at my decease renounce the trusts hereof, or be incapable of acting therein, or in case any such trustee shall at any time after my decease die or decline or become incapable to act in the aforesaid trusts before the same shall be fully performed or satisfied, or shall become bankrupt, or take the benefit of any act for the relief of insolvent debtors (*h*), then

Power to appoint new trustees.

Remarks on the power of appointing new trustees.

(*h*) This may seem to be rather an operose provision against vacancies occurring in the trusteeship, but a clause less elaborately comprehensive would not take in the whole range of events by which vacancies might arise in the lifetime of the testator or afterwards. It has not been usual, indeed, in framing such powers, to provide against vacancies happening in the testator's lifetime, under an impression, probably, that the testator might himself supply, by a new nomination, any vacancy occurring before his death; but it is to be remembered, that the event may happen while the testator is incapable of altering his will, so that the power clearly ought to embrace this class of events. The extension of the power to bankruptcy and insolvency is also an innovation; but it seems proper that an event which must weaken the confidence of the persons beneficially interested, and may actually endanger the property, should be made a ground of removal. The expediency of the proposed extension of the power of course will considerably depend upon the degree to

and so often as the same shall happen it shall be lawful for the surviving or continuing or other trustee or trustees for the time being of this my will, by any note or writing under their, his, or her hands or hand, with the consent in writing of my said wife, if then living and unmarried, and after her decease or marriage of their, his, or her own proper authority, to nominate and appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees who shall so die, renounce, or decline or become incapable to act, or become bankrupt or insolvent as aforesaid. And that when and as often as any new trustee or trustees shall be nominated and appointed in manner aforesaid, all the trust premises for the time being shall thereupon, with all convenient speed, at the expense of the trust estate, be conveyed, assigned, and transferred, in such a manner and so that the same shall and may be legally and effectually vested in the newly-appointed trustee or trustees jointly with the continuing trustee or trustees, or, in case there shall be no continuing trustee or trustees, then in such newly-appointed trustee or trustees only, upon the trusts and for the intents and purposes hereinbefore by me declared concerning the same; and every such new trustee or trustees shall and may in all respects act in the execution of the trusts to which he or they shall be so appointed, as fully and effectually, and with all such powers and authorities whatsoever, as if such new trustees or trustee had been originally by me appointed and nominated. And I HEREBY APPOINT my said dear wife [*name*], and [*trustees*], executrix and executors of this my last will and testament. And I appoint the said [*trustees*], and the survivors and survivor of them, or other the trustees or trustee for the time being of this my will, guar-

Appointment of executors and guardians.

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which, by the nature of the trusts, the property is placed under the control of the trustees; not at all upon the rank or character of the *existing* trustees, they being a fluctuating body.

Some practitioners extend the provision in question to proceedings in a foreign country, analogous to bankruptcy in England, by adding such words as the following:

"Or shall take the benefit of any foreign law for the relief of debtors, by cessio bonorum, sequestration, or any other means."

OF REAL AND PERSONAL ESTATE.

dians and guardian of my said son, and of all and every child or children of mine, if any, hereafter to be born, during their respective minorities. PROVIDED ALWAYS, and I do hereby direct and declare, that my said executors and trustees for the time being shall be charged and chargeable only for so much money as they respectively shall actually receive by virtue of this my will, and that any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them; nor shall they or any or either of them be answerable for any banker, broker, goldsmith, or other person or persons in whose hands any trust monies shall be deposited for safe custody, nor for the insufficiency or deficiency of any security in or upon which the said trust monies or any part thereof shall or may be invested, or for any other misfortune, loss, or damage which shall or may happen in the execution of the trusts hereby created, unless the same shall happen through their own wilful neglects or defaults respectively; and also that my said executors and trustees for the time being shall and may, out of the monies which shall come to their respective hands by virtue of this my will, retain to and reimburse themselves respectively, and also allow to their co-trustee and co-trustees, all costs and expenses which they respectively shall or may pay or disburse on account or by reason of the trusts hereby in them reposed, or otherwise howsoever relating thereto (*i*). AND lastly, I hereby revoke all former and other wills by me at any time heretofore made, and do publish and declare this only as my last will and testament. IN WITNESS, &c.

Indemnity to trustees and executors.

Trustees and executors may deduct expenses.

Revocation of all former wills.

(*i*) Add, if so intended:

Authority to trustees to charge for business done as solicitors.

"And especially I hereby declare, that any present or future trustee of this my will, who is or shall be of the profession of an attorney or solicitor, shall be entitled to make the same charges for business professionally transacted for the trust estate as such trustee would have been entitled to make for such business, if he had not been a trustee*.

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* *Vide ante*, Vol. 9, p. 337.

WILL *limiting Real Estate to Testator's* SONS SUCCESSIVELY *for* LIFE, *with Remainder to their* FIRST *and* OTHER SONS *in* TAIL MALE, *with Remainder to Testator's* DAUGHTERS CONCURRENTLY *for* LIFE, *with Remainder as to Daughters' Respective Shares to their* FIRST *and* OTHER SONS *in* TAIL MALE; CROSS REMAINDERS *among the* DAUGHTERS *and their* ISSUE, *with Remainder to Testator's* CHILDREN *concurrently in* TAIL *General.* CLAUSE REDUCING ESTATES TAIL *of Devisees* BORN *in* TESTATOR'S LIFETIME *to* ESTATES *for* LIFE. *Short* GENERAL DEVISE, *upon Trust for* PRESERVING CONTINGENT REMAINDERS. *Power to* APPLY RENTS *for* MAINTENANCE *during Minority, and* ACCUMULATE SURPLUS *to be invested upon* SECURITY, *and eventually in the* PURCHASE *of* LANDS. *Short* POWERS *of* JOINTURING, CHARGING PORTIONS *for* YOUNGER CHILDREN, GRANTING LEASES *(including* BUILDING *Leases)*, SELLING *and* EXCHANGING; LEGACIES *to* SERVANTS; BEQUESTS *of* ARTICLES *of* PERSONALTY *to the Respective* SONS; LEGACIES *to* DAUGHTERS *payable on* MARRIAGE, *with* CLAUSE *of* ACCRUER, *subject to a* TESTAMENTARY POWER *over Part;* LEGACIES *to* YOUNGER SONS; RESIDUE *to* CHILDREN GENERALLY. POWER *to raise* DEBTS *and* LEGACIES *by* MORTGAGE *in Aid of the* PERSONAL ESTATE. *(A Concise Form)* (*a*).

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I GIVE, DEVISE, AND APPOINT all those my farm and lands called ——, in the county of ——, and all other the real estates whatsoever and wheresoever in

Devise to testator's first and other sons successively and their male issue, in strict settle-

(*a*) The limitations and powers in this precedent are framed with extreme conciseness. Examples of similar limitations and powers, more fully expressed, will be found in subsequent precedents.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

ment, with remainder,

which I have any devisable interest, or over which I have any general power of testamentary appointment, *To the uses* following; that is to say, *To the use* of my eldest son [*name*] for his life without impeachment of waste, and after his decease, *To the use* of his sons successively, according to their respective seniorities, in tail male; And for default of such issue, *To the use* of my son [*second son*] for his life, without impeachment of waste, and after his decease, *To the use* of his sons successively, according to their respective seniorities, in tail male; And for default of such issue, *To the use* of my son [*third son*] for his life, without impeachment of waste, and after his decease, *To the use* of his sons successively, according to their respective seniorities, in tail male;

To testator's daughters concurrently and their issue in strict settlement.

And for default of such issue, *To the use* of my daughters [*names*] during their respective lives, in equal shares, as tenants in common, without impeachment of waste. And as to the respective shares therein of each of them my said daughters after her decease, *To the use* of her sons successively, according to their respective seniorities, in tail male; and on

Cross-remainders among the daughters and their issue. On failure of issue of all the daughters,

failure of the issue male of any one or more of my said daughters, then and so often as the same shall happen, as to as well the share or respective shares originally limited to the daughter or daughters whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in her or them or her or their issue male, *To the use* of the other or others of my said daughters during her or their life or respective lives, in equal shares, as tenants in common, without impeachment of waste; and after the decease of any such last-mentioned daughter, then as to the share or shares lastly hereinbefore limited to her, *To the use* of her sons successively, according to their respective seniorities, in tail male; And if there shall be a failure of such issue male of all my said daughters but one, then as to the entirety of all the said estates, *To the use* of such only daughter for her life, without impeachment of waste, and after her decease *To the use* of her sons successively, according to their respective seniorities, in tail male (*b*); And for default of such issue, *To the use*

To testator's children con-

(*b*) In this instance, it will be seen that the testator contents himself with giving estates in tail *male* to the *sons* of his children. More elaborate and comprehensive entailing limitations occur in subsequent precedents.

of my said several sons and daughters as tenants in common in tail general, with cross-remainders between and among them in tail general; and if all my said children except one shall die without issue, *To the use* of such only remaining child in tail general; and for default of such issue, *To the use* of my own right heirs for ever. PROVIDED ALWAYS, that if any person whom I have hereby made tenant in tail male of my said estates shall be born in my lifetime, then and in every such case I revoke the devise and appointment so made to him, and in lieu thereof I give, devise, and appoint the hereditaments comprised in such devise and appointment, to the use of the same person respectively for the term of his natural life without impeachment of waste; and after his decease, To the use of his sons successively according to their respective seniorities in tail male (*c*). AND for the purpose of preserving the contingent remainders hereinbefore created from being destroyed, I give, devise, and appoint the hereditaments hereby limited to any person during the term of his or her natural life, immediately after the determination of that estate by forfeiture or otherwise during his or her respective lifetime, unto and to the use of [*trustees*], of &c., and their heirs, during the life of the tenant for life whose estate shall so determine, IN TRUST for him or her, and by the usual means to preserve the contingent remainders expectant or depending thereupon from being destroyed (*d*). PROVIDED ALWAYS, and I hereby direct, that if any person for the time being entitled to the actual possession or to the receipt of the rents and profits of the estates hereinbefore devised and appointed respectively,

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

currently in tail general, with cross-remainders.

Ultimate remainder,

to testator's own right heirs.

Tenants in tail male born in testator's lifetime made tenants for life, with remainder to their issue in strict settlement.

General devise to trustees to preserve contingent remainders.

Power to apply adequate part of income during minority to maintenance,

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(*c*) The testator, having made his existing sons tenants for life, with remainder to their first and other sons in tail, has carried into effect his entail scheme, so far as was consistent with circumstances existing at the time of the execution of his will. If, at that period, any of his sons had had issue, he would have devised to such issue estates for life, with remainder to their sons in tail; and the object of the present clause is, to accomplish this purpose, in the event of any of the testator's children having issue in his lifetime. It will be observed, that the limitations do not contemplate or provide for any addition occurring to the number of the testator's own children in his lifetime.

As to clause reducing the estates of tenants in tail born in testator's lifetime, to estates for life.

(*d*) This is a short mode of avoiding the necessity of interposing an estate for preserving contingent remainders in each instance.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

shall then be under the age of twenty-one years and unmarried, the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor, do and shall, so long as the person entitled as aforesaid shall be under the age of twenty-one years and unmarried, enter into and receive the rents and profits of the said estates, and apply such part thereof as they or he shall think proper for the maintenance and education of such person respectively; or, in the discretion of the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, shall pay the same to the guardian or guardians of such minor for the purpose of being so applied; and do and shall invest the residue or surplus in the names or name of the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, on government or real securities, so that the same and the resulting income thereof may accumulate in the nature of compound interest; and at the end of each such period of accumulation or sooner, if they or he shall think proper, do and shall call in and convert into money the said accumulated fund, and lay out and invest the same in the purchase of freehold, leasehold, or copyhold estates to be situate in England or Wales, and do and shall settle the lands so to be purchased to the uses and in the manner to and in which I have hereinbefore limited the estates from the rents of which such accumulations shall have proceeded; but if any such investments shall be made during the continuance of the period of accumulation, the rents of the estates so to be purchased shall, to the end of the period of accumulation, be accumulated in the manner and for the purposes hereinbefore mentioned. NEVERTHELESS, I hereby declare, that the said trust for accumulation shall not in any case extend beyond the period of twenty-one years computed from the day of my decease (*e*). AND I further declare, that the receipts of the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, for the rents and profits of the said real estates which shall be paid to them or him by virtue of the clause lastly hereinbefore contained, and also the receipts of the guardian or guardians for the time being of any minor devisee for life or in tail, to whom

and accumulate residue.

Receipts of trustees and guardians for rents to be sufficient discharges.

(*e*) *Vide ante*, p. 65.

any sum or sums of money shall be paid for his or her maintenance and education as aforesaid, shall effectually discharge the persons paying the same monies respectively from all responsibility in respect of the application thereof. PROVIDED NEVERTHELESS, and I further declare, that if, during any such minority as aforesaid, the said hereditaments hereinbefore devised and appointed respectively shall be subject to any mortgage or mortgages, whether created under the power hereinafter contained or otherwise, it shall be lawful for the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, and they and he are and is hereby directed to apply the whole or any part of the fund or funds to be accumulated as aforesaid in or towards payment and satisfaction of such mortgage debt or mortgage debts. PROVIDED ALSO, and I further declare, that it shall be lawful for my said sons respectively, and any and every other male person, who by virtue of this my will shall become entitled to the actual possession or to the actual receipt of the rents and profits of the said real estates hereinbefore devised and appointed respectively, either before or after they respectively shall become so entitled, and either before or after marriage, by deed executed by them respectively in the presence of two witnesses, or by will executed by them respectively in the presence of three witnesses, to charge the whole or any part of the said estates with the payment of any annual sum, not exceeding £——, to any woman with whom they may respectively marry, for the term of her natural life, to be payable quarterly or half yearly, without any deduction, with usual powers of distress and entry and detention of possession and perception of rents; and also to limit the hereditaments so to be charged to trustees for any term or terms of years, upon the usual trusts for securing the payment of the said annual sum, and also to charge the said last-mentioned hereditaments, or any part or parts thereof, with any sum of money not exceeding in the whole the sum of £——, for the portion or portions of any of their respective children other than and besides an eldest or only son for the time being entitled to the said estates for an estate in tail male in possession, or in remainder expectant upon the decease of his parent exercising the said power, and to appoint the hereditaments so to be charged

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

Mortgage debts to be liquidated out of accumulated fund.

Power to male tenants for life, (who shall become entitled in possession), to charge estate with jointure and portions.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

to any person for a term of years, IN TRUST to raise the portion or portions so to be charged (*f*). PROVIDED ALSO, and I further declare, that it shall be lawful for every person who by virtue of this my will shall be tenant for life in possession, or tenant in tail male in possession, of any of the hereditaments hereby devised and appointed respectively, and who shall have attained his or her age of twenty-one years, and for the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor during the minority of any such tenant for life or in tail male, by any deed or instrument in writing, to be sealed and delivered by him, her, or them, and attested by one or more witness or witnesses, to appoint the said estates respectively to any person by way of lease for any term of years not exceeding twenty-one years, to be computed from the making thereof, at the best yearly rent that can be reasonably gotten for the same, without taking any fine or foregift for the making thereof, but so that there be contained therein a condition of re-entry for nonpayment of the rent thereby to be reserved, and so that the lessee execute a counterpart thereof, and thereby covenant for the payment of the rent. PROVIDED ALSO, that it shall be lawful for every person who by virtue of this my will shall be tenant for life in possession, or tenant in tail male in possession of the hereditaments respectively hereby devised and appointed, and who shall have attained his or her age of twenty-one years, and for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor during the minority of any such tenant for life or in tail male, by any deed or instrument in writing, to be sealed and delivered by him, her, or them, and attested by one or more witness or witnesses, to appoint by way of lease any part of the said estate to any person who shall improve, or covenant or agree to improve the same by erecting or building thereupon any new house or new erection, or to rebuild or repair any of the messuages, erections, and buildings whatsoever which now are or which hereafter shall be upon the said hereditaments, or any part thereof, or who shall expend or covenant to expend any sum of money in the

Ordinary power of leasing for twenty-one years.

Power to grant building leases for ninety-nine years.

(*f*) Here, it will be observed, no limit is fixed on the aggregate amount of the charges to be created under these powers, to be existing at one and the same time, as in similar powers in subsequent precedents.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

improvement or amelioration thereof respectively, which the person or persons making such appointment by way of lease shall think adequate to the interest to be departed with, for any term of years not exceeding ninety-nine years, at such rent, or upon such terms and conditions as shall be thought reasonable, and without taking any fine or foregift for the making thereof beyond such covenants or agreements as aforesaid, but so that the lessee execute a counterpart of the appointment so to be made to him by way of lease as aforesaid, and be not thereby exempted from punishment for committing waste farther than shall be necessary for making or effecting the buildings or improvements thereby covenanted and agreed to be made. PROVIDED ALSO, and I further declare, that it shall be lawful for the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, at the request in writing of any person who shall be tenant for life or in tail male in possession for the time being under this my will, to dispose of, either by way of absolute sale or in exchange for other hereditaments situate in England or Wales, any part or parts of the estates of which such person shall be actual tenant for life or in tail male as hereinbefore is mentioned. And that for the purpose of effecting such sales or exchanges, it shall be lawful for the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, by any deed sealed and delivered by them or him, and attested by one or more witness or witnesses, to revoke the uses and trusts hereinbefore or hereinafter created, or which shall be created by any codicil to this my will, or by an exercise of any of the powers hereinbefore contained or to be contained in any such codicil, and to appoint such other uses or trusts as it may be thought necessary or expedient to appoint in order to effectuate any such sale or exchange, and to receive upon every such exchange any sum of money by way of equality of exchange. AND also that, upon payment of the money to be raised by sale of the hereditaments devised by this my will, or any part thereof, or for any money to be paid for equality of exchange, to sign and give receipts for the same respectively, and that such receipts shall effectually discharge the persons paying the same from being answerable for the misapplication or being bound to see to the application of the money therein mentioned to be received.

Powers of selling and exchanging.

Power to give receipts to purchasers.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

Direction to reinvest monies in land.

AND that the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, shall lay out the money arising from any such sale, or so to be paid for equality of exchange (after discharging thereout any mortgage debt which may have been created of the hereditaments so sold, by virtue of the power in this behalf hereinafter contained), in the purchase of freehold, leasehold, or copyhold estates (the leaseholds to be held for a term of not less than —— years), situate in England or Wales, to be approved of by some writing under the hand of the person who would be tenant for life or in tail male thereof, if the same were then actually purchased and settled, in case such person shall have attained his or her age of twenty-one years; but if such person shall be under the age of twenty-one years, then every such purchase shall be made at the discretion of the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor. And that the said [*trustees*], and the survivor of them, and the heirs, executors, or administrators of such survivor, shall settle the estates, so to be purchased or received by way of exchange, To the uses and upon the trusts hereinbefore expressed of the hereditaments which shall be so sold or given in exchange, or as near thereto as the nature and quality of the said estates and intervening circumstances will admit of; yet so that if any of the hereditaments to be purchased as aforesaid shall be held by a lease for years, the same, as to the effect or purpose of transmission, shall not vest absolutely in the child of any person hereby made tenant for life who shall not attain the age of twenty-one years.

Direction to invest purchase monies on security until invested in land.

AND my will is, that until a proper purchase shall be found, upon which the money arising from the said sales or exchanges shall be invested, the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall invest the money arising from such sale, or received for equality of exchange, as aforesaid, in their or his names or name, in government or real securities in England (with power to alter and vary the same as he or they shall think proper), and pay the interest, dividends, and annual produce of the said sums of money, stocks, funds, and securities to the persons who would be entitled to the rents and profits of the estates so to be purchased as aforesaid, if the same were then actually purchased and settled.

Discretionary

PROVIDED ALWAYS,

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

and I hereby declare, that any sale or sales to be made under the aforesaid power in this behalf may be made either by public auction or private contract, and with such restrictions and stipulations concerning title (*g*), or otherwise, as the persons exercising the same shall think proper, and that any and every person and persons who is and are hereby empowered to enter into any contract or contracts for sale or purchase or otherwise, shall have full power and authority to rescind or vary the same, as may be deemed expedient. And I declare, that when any purchase shall be made of real estate, in pursuance of the power in that behalf hereinbefore contained, the person or persons making the same shall be exempt from all responsibility in regard to the title of the hereditaments so purchased, provided that the same shall have been approved by counsel on behalf of such purchaser or purchasers. I DIRECT that my wearing apparel be distributed among my servants in such manner as my executors shall think proper. I GIVE to each of my servants who shall have been in my service continuously for two years preceding my decease the sum of £——, to be paid immediately on my decease. I GIVE to my said son [*second son*] all my books and manuscripts and engravings, not in frames, of which I shall be possessed at the time of my decease. I GIVE to my said son [*third son*] my museum of fossils and natural curiosities, and including the entire contents thereof at the time of my decease. I GIVE to my said son [*eldest son*] all my household goods, pictures of every description in frames, plate, linen, china, glass, musical instruments, watches, jewelry and trinkets, fire arms, horses and carriages, and the equipage and furniture belonging thereto, cows, poultry, and other live stock, greenhouse and other plants in pots, gardening and husbandry implements, domestic animals,

power in reference to mode of sale, &c.

Wearing apparel among servants.

Pecuniary legacy to servants.

Museum.

Household goods, &c.

(*g*) It will be observed, that the donees of the power are authorized to *sell*, but not to *purchase*, under restrictive stipulations as to title. The latter, indeed, is a power not to be too readily conceded to trustees, as it would enable them to expose the trust monies to great hazard, by entering into one of those imprudent contracts—now so common—which preclude a purchaser from all investigation of title, or confine his range of inquiry within very narrow limits. It is clear that trustees, without special authority, are not justified in purchasing under any restrictive conditions of this nature.

As to authorizing trustees to purchase under restrictive conditions, in regard to title.

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

wines, liquors, and consumable stores, and other the household effects not hereinbefore bequeathed, of which I shall be possessed at the time of my decease. And I declare, that the last-mentioned bequest shall comprise all effects, though not strictly household, which are applicable to personal use, ornament, or diversion (*h*). I GIVE to each of my daughters who shall marry the sum of £——, and I direct that the same shall vest in and be paid to each such daughter upon her marriage; and if any of my daughters shall attain the age of twenty-one years, and die without having been married, I declare that it shall be lawful for every such daughter, by any will, codicil, or other testamentary writing, to bequeath the sum of £—— (part of the sum of £——, so intended for her), to such persons and for such purposes as she shall think proper. AND if any of my said daughters shall depart this life without having been married, I direct, as well the £—— hereby originally intended for every such daughter, as any share which shall have survived or accrued to her in any other like sum by virtue of this present clause (*i*),

Pecuniary legacy to daughters on marriage,

with power, in case of dying unmarried, to bequeath part thereof by will.

Clause of accruer.

(*h*) The reasons for introducing these special words at the close of the long enumeration of articles will appear in a subsequent note, for which see Index to this volume, title "Household Effects."

Suggestions as to the framing of clauses of accruer.

(*i*) In framing clauses of accruer, two points especially demand the attention of the draftsman: they are—First, explicitly to shew that the clause is to operate in favour, not exclusively of survivors properly so called, but also of those who may have antecedently died (their death having occurred under such circumstances as not to divest their shares), which it may be presumed is the invariable intention of every testator, by or on behalf of whom such a clause is penned. Indeed, so strong has been the conviction of this, that, for the purpose of effecting the object, the Courts have always gladly availed themselves of any ground afforded by the context for reading the word "survivor," as synonymous with "other."

Word "survivor" construed as synonymous with *other*, when.

Thus, in the case of *Wilmot* v. *Wilmot*, 8 Ves. 10, (see also *Harman* v. *Dickenson*, 1 Br. C. C. 91), where a testator bequeathed to his son A. one third part of what he might die possessed of, to be put out at interest, but the son was not to be put in possession until the age of twenty-five years; and the testator gave to each of his daughters, B. and C., one third of what he might die possessed of, to be put out at interest, but they were not to be put in possession until the age of twenty-one years; and the testator willed that, in case of the death of either of the above-named

(but deducting out of the same the said sum of £——, or so much thereof as she may have bequeathed in exercise of the

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

children before they attained the before-mentioned ages, the said third part which would have been coming to the deceased child might be equally divided between the *two surviving children*, and, in the event of the death of two of the above-mentioned children before they attained the said respective ages, then it was the testator's will that the whole of what he might die possessed of should devolve to the *surviving child*; but should all his children die before they attained their said respective ages, then the whole of his estate was to devolve to the testator's brothers, D. and E., and their heirs. B. attained twenty-one, and died; A. afterwards died under twenty-five. A petition was presented by D., the only surviving child, claiming the entire share of A.; but Lord *Eldon* held, that the administrator of B., the deceased child, was entitled to participate, his Lordship being of opinion, that the word "surviving" here meant the same as "other," or "living at the age aforesaid." He remarked, that, in the clause in which the gift over is made, it was never intended that any portion should be taken: it was to be either the whole or none.

Remark upon *Wilmot* v. *Wilmot*.

In this case the context evidently favoured the construction adopted by the Court; for it was apparent, from the tenor of the clause, that an entire share was not to accrue to a single survivor, unless and until *two* of the legatees had died under the prescribed ages.

The next instance in which the liberal construction of the word "survivor" occurs, is *Barlow* v. *Salter*, 17 Ves. 479, where a testator, in a certain event, directed all his real and personal estate to be divided between his four nephews and nieces, N., W., C., and E.; C.'s part only for life, *and her part to be divided between the survivors*—Sir *W. Grant*, M. R., treated it as clear, that C.'s share, at her death, would go to the other three legatees, whether then living or not, observing that "survivors," as here used, had the same sense as "others," as had been frequently decided.

Remarks upon *Barlow* v. *Salter*.

This case is certainly more destitute of grounds for changing the words "survivors" into "others," than *Wilmot* v. *Wilmot;* but it is to be remarked, that the point was only incidentally adverted to by the Master of the Rolls, whose opinion on it formed no part of, though it may have influenced, his adjudication. His Honour's dictum, however, coupled with the rather general remarks of Lord *Eldon* in *Wilmot* v. *Wilmot*, and some positions advanced by Lord *Alvanley* in the case of *Milsom* v. *Awdry*, 5 Ves. 465, are sufficient to account for the notion which obtained extensively in the profession, that "survivor" might even, without any explanatory context, be read as importing *other*—a notion that now stands corrected by numerous decisions, which shew that this word,

STRICT SETTLEMENT, WITH USUAL POWERS. (CONCISE).

power given to her for that purpose), to be paid to my other daughters or daughter who shall marry, and to be divided

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like all others, must, when unexplained by other parts of the will, be construed according to its natural and proper signification.

"Survivor" construed strictly, and not as importing *other*.

Thus, in the case of *Davidson* v. *Dallas*, 14 Ves. 576, where a testator bequeathed to the children of his brother, R. D., £3000, to be equally divided among them, and if either of them should die before the age of twenty-one years, their share to go to the *survivors*:—Lord *Eldon*, after referring to the rule for construing "survivors," as importing *others*, observed that there was nothing in this will indicating a general intention, upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

So, in the case of *Crowder* v. *Stone*, 3 Russ. 217, where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor, to be divided equally between his nephew and four nieces, and in case of the death of his said nephew, or of any or either of his said nieces without issue before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them so dying without issue as aforesaid should go to and be equally divided between and amongst the *survivor and survivors* of them, share and share alike. At the decease of the testator's wife, one niece only survived; some of the deceased nieces had and others had not left issue. Lord *Lyndhurst* held that the survivor was entitled to the whole. "It was contended," he observed, "that the words 'survivor and survivors of them,' were to be construed 'other and others.' That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord *Eldon*, in *Davidson* v. *Dallas*, calls a 'forced construction of the term survivor,' 14 Ves. 578, and he contrasts it with what he calls 'its natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot* v. *Wilmot*, it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me, that the words 'survivor and survivors' are here to be taken in their natural meaning. The shares, which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively."

General conclusion from the cases.

These decisions agree with and are fully supported by the earlier cases of *Ferguson* v. *Dunbar*, 3 B. C. C. 469, n.; and *Milsom* v. *Awdry*, 5 Ves. 465: the whole constituting a chain of authority sufficiently strong to pre-

between or amongst them (if more than one), in equal shares, so far as to make each of my said daughters' fortunes amount

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clude the slightest hope of maintaining the enlarged construction of the word "survivor," without an explanatory context. And the circumstance, that there occurs in the same will, in reference to another subject or other objects, an instance of the words "survivor" and "other" being used conjunctively, is not considered to imply an intention to give to the word "survivor," standing alone, their united force or signification.

Effect of "survivor" being in some instances associated with "other."

Thus, in the case of *Winterton* v. *Crawfurd*, 1 Russ. & Myl. 407, where a testator devised the residue of his real estate to trustees, upon trust as to one third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor and others or other of them; and after giving the other two thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child and children *of the survivors or survivor* of his said daughters per stirpes, and the heirs of the bodies of such child and children; and in case any one or more of such children should die without issue, then as to the shares of him, her, or them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny—Sir *J. Leach*, M. R., said—"In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the

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to the sum of £——, and not further. And I direct, that the said legacies to my said daughters shall carry interest at 4*l.*

testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated, if, upon the death of Lady Winterton * without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare, that Lady Winterton is entitled for life, to her separate use, to the one third share of the real estate, which by the will was given to her sister Louisa."

Remarks upon *Winterton* v. *Crawfurd.*

The reasoning of the Master of the Rolls, in regard to the inconsistency between the devise *for life* to the survivors, and the notion that the children of the deceased devisees were to stand in their place, is inconclusive, because, though the devise for life could not take effect in regard to any deceased child, the devise in remainder to the issue of such child might. Indeed, if his Honour was right in the opinion expressed by him, that after the death of the last surviving daughter the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there would seem to be great difficulty in upholding his decision, as it would involve the absurdity of reading the same words in two different senses. The case too would then be in direct opposition to *Doe* v. *Wainwright*, 5 Durn. & E. 427, where, *even in a deed*, the limitation of cross remainders in tail to *surviving* children was held to take effect in favour of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate devise, that the estate was not to go over, unless the issue of *all* the children failed.

Clauses of accruer should be extended to accruing shares.

The other point to be attended to in framing clauses of accruer is, to make the clause in express and unequivocal terms embrace accruing as well as original shares, since an intention to this effect cannot, consistently with the established construction, be implied. For instance, in the case of a legacy to A., B., and C., in equal shares, with a proviso, that in the event of any of them dying under the age of twenty-one years, the share or shares of him, her, or them so dying should go to the survivors or survivor, others or other. If A. dies under twenty-one years, leaving B. and C. surviving, and B. afterwards dies under that age in the lifetime of C., that portion

* This lady was Harriet, the survivor of the three daughters.

per centum per annum, to be payable quarterly, from the time of my decease. And while any of my said daughters shall be under the age of twenty-one years and unmarried, an adequate part of the interest then attending the presumptive legacy of each such respective daughter shall, in the discretion of my executors, be applied for her maintenance and education, and the residue accumulated at interest, the same to become an interest vested in and be paid to her when and so soon as such respective daughter shall attain the age of twenty-one years, or on her marriage, which shall first happen, otherwise the same to sink into my residuary personal estate. And if such my respective daughter shall attain the age of twenty-one years, without having been married, the whole accruing interest of her then presumptive portion shall from that time until she shall marry or depart this life be paid to or for her own proper use and benefit. AND I GIVE to each of my sons, other than and except such one of my said sons (if any) as, at the time of my decease, shall be entitled, under the limitations aforesaid, to an estate for life in possession in the real estates respectively hereinbefore devised and appointed, the sum of £——, the same to be a vested interest in each such son immediately on my decease, but not to be payable until the expiration of eighteen calendar months after my decease; nevertheless, I declare that each of the said legacies shall carry interest at the rate aforesaid from the time

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Pecuniary legacies to younger sons.

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of the share of A. which had previously accrued to B. under the clause in question would not, on the death of the latter, go to C. with the original share of B., but would belong to the representatives of B. as part of his personal estate, the word "share" being confined to the original share; *Woodward* v. *Glasbrook*, 2 Vern. 388; *Ex parte West*, 1 B. C. C. 575; *Crowder* v. *Stone*, 3 Russ. 217; a result which is manifestly contrary to every reasonable conjecture of intention. As a matter of course, therefore, the shares, both original and accruing, of the several objects should be expressly subjected to the clause of accruer, as in the numerous examples of this clause to be found in the precedents of the present work. Slight expressions have been held to be sufficient for this purpose; thus, in *Milsom* v. *Awdry*, 5 Ves. 465, the words "in manner aforesaid," introduced into the gift of the accruing shares, were decided to have the effect of subjecting them to the operation of the clause of accruer. See also *Worlidge* v. *Churchill*, 3 B. C. C. 465. The prudent draftsman, however, will not be content to rely on any equivocal expressions.

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of my decease, to be payable quarterly. And as to all the residue of the personal estate of which I shall be possessed at the time of my decease, or over which I have any disposing power, I give and appoint the same unto and between or among all my children (without any exception whatever) who shall be living at the time of my decease, in equal shares, for their own respective absolute use and benefit. And I direct my trustees and executors to pay my funeral expenses, debts, and legacies, out of my general residuary personal estate; and if that shall not be sufficient for the payment thereof, I empower and direct the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, to raise money sufficient to pay the same, by mortgage of the whole or any part of my real estates hereinbefore devised and appointed respectively. And for the purpose of effecting any such mortgage or mortgages, I declare that it shall be lawful for the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, by any deed or deeds, to be sealed and delivered by them or him in the presence of one or more witness or witnesses, to limit and appoint the said estates, or any part thereof, to any person or persons, or the nominee or nominees of any person or persons who shall advance any sum or sums of money on such security, either in fee simple or for any term or terms of years, and either with or without a power of sale, in case of default being made in the payment of the principal and interest monies, at the time or times to be appointed for the payment thereof respectively, and with such other and accompanying powers, clauses, and provisions, as shall be deemed expedient, and to give receipts for the money so to be advanced; and that such receipts shall discharge the persons to whom the same shall be given from being accountable for the misapplication or being obliged to see to the application of the money therein mentioned and acknowledged to be received. And further, that any mortgagee or mortgagees shall not be bound to inquire into the necessity or propriety of any such mortgage or mortgages, nor be affected by express notice that the same is or are unnecessary and improper. [*Power to appoint new trustees, indemnity clauses, and appointment of executors and guardians.*] In witness, &c.

Residuary bequest.

Power of mortgaging real estates to pay debts and legacies.

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

WILL *of a* LANDED PROPRIETOR. BEQUEST *of* RENEWABLE LEASEHOLDS, *in Trust to* PERFORM *the* COVENANTS *of* LEASE, *and effect* RENEWALS; *and, subject thereto, in Trust for Testator's* ELDEST SON *attaining Twenty-one; if no Son, for his* ELDEST DAUGHTER *for the time being* ATTAINING *that* AGE *or* MARRYING. *Special Power to* ACCUMULATE RENTS *during Minority, and after providing Maintenance, to* INVEST *Residue on* GOVERNMENT *or* REAL SECURITIES, *to be eventually* LAID OUT *in* PURCHASE *of* LANDS. POWER *to apply* ACCUMULATED FUND *in paying the* EXPENSES *of* RENEWALS *and* MORTGAGE DEBTS, *if any.* DEVISE *out of Freehold Estates of Rent Charge to Testator's* WIDOW *for* LIFE; *further* RENT CHARGE *to her for* WIDOWHOOD, *Subject thereto, the Estates are devised to Testator's* SONS *born and to be born and their* ISSUE *successively in* STRICT SETTLEMENT, *with Remainder to his* DAUGHTERS *successively and their* ISSUE *in like manner, the Life Interests of Daughters being for their* SEPARATE *Use.* POWER *to Testator's* SONS (*Tenants for Life*) *to* CHARGE JOINTURES—*to* DAUGHTERS *to* APPOINT *Life* ESTATES *to* HUSBANDS—*to* SONS *and* DAUGHTERS *to charge* PORTIONS *for* YOUNGER CHILDREN, *the aggregate Amount of both Species of Charges being* LIMITED. POWERS *to* GRANT LEASES—*grant* LICENCES *to* COPYHOLDERS *to* DEMISE, SELL, *and* EXCHANGE, *also to* ENFRANCHISE COPYHOLDS *and* JOIN *in* PARTITION. DEVISE *of* COPYHOLDS *to* USES *corresponding* (*so far as may be*) *with the* LIMITATIONS *of the* FREEHOLDS. BEQUEST *of Personalty for* YOUNGER CHILDREN *or an only* CHILD *absolutely.* PROVISIONS *for* MAINTENANCE *and* ADVANCEMENT, *and other ordinary* POWERS *and*

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

INDEMNITIES. APPOINTMENT *of* GUARDIANS *of* SONS *and* DAUGHTERS RESPECTIVELY, *and Special Directions concerning their Education.*

Revocation of all former wills.

I [*testator*], of &c., do hereby revoke all wills, codicils, and other testamentary dispositions made by me at any time or times heretofore, and declare this to be my last will and testament.

Direction as to funeral.

I DIRECT that my funeral may be conducted with as much privacy as possible.

Pecuniary legacy to testator's wife.

I GIVE AND BEQUEATH unto my dear wife the sum of £——, to be paid to her within one calendar month next after my decease.

Legacies to his servants.

I GIVE AND BEQUEATH to each of the servants who shall be in my service at the time of my decease, and shall have lived with me continuously three years or upwards, two years' wages; and to each of the other servants who shall be in my service at the time of my decease, and shall have lived with me continuously one year or upwards, one year's wages, in addition to what may be due and owing to them respectively on account of wages at the time of my decease (*a*).

I GIVE AND BEQUEATH to the servant who shall be my valet at the time of my decease such of my clothes and wearing apparel as my executors shall think most suitable.

I GIVE AND BEQUEATH to my friends [*names*], the sum of £—— each, for the purchase of mourning rings (*b*).

Bequest of renewable leaseholds to trustees.

I GIVE AND BEQUEATH my leasehold messuages, lands, and tenements, called or known by the name of ——, situate in the parish of ——, in the county of ——, and holden by me under the lord bishop of ——, with their appurtenances, unto [*trustees*], of &c., their executors, administrators, and assigns, for and during all such estate or interest as I shall have or be entitled to therein at the time of my decease, upon the trusts

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As to legacies to servants.

(*a*) A legacy to servants applies to such only as spend their whole time in the testator's service, and not to one who is occasionally employed only, such as a steward of courts. *Townsend* v. *Windham*, 2 Vern. 546. It has been held also not to extend to a coachman supplied by a job master. *Chilcott* v. *Bromley*, 12 Ves. 141.

A legacy of a year's wages is confined to such servants as are hired by the year. *Booth* v. *Dean*, 1 Myl. & Kee. 560.

(*b*) Legacies for mourning rings are undistinguishable from other pecuniary legacies in regard to their carrying interest, &c. *Apreece* v. *Apreece*, 1 Ves. & Bea. 364.

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

hereinafter declared concerning the same (that is to say), UPON TRUST, in the first place, from time to time, by and out of the rents and profits of the same premises, to pay, satisfy, and perform the several rents, reservations, and covenants which are reserved and contained in the lease or leases now subsisting of the same premises respectively, or which in and by any renewed lease or leases thereof, to be from time to time taken, shall be reserved and contained, on the part of the lessee or lessees to be paid and performed. AND, UPON FURTHER TRUST, from time to time, by and out of the rents and profits of the said leasehold premises, or by mortgaging the same or any part thereof, to raise such sum or sums of money as shall be sufficient to defray the expenses of the fines and other charges of renewing the now subsisting lease or leases, or any other lease or leases hereafter to be taken of the same premises, when and as often as the same shall expire, or, in the usual course or custom of such leases, shall become renewable, and from time to time to renew or to endeavour to renew the same accordingly. And I empower the said trustees and trustee, for the purposes aforesaid, to surrender the present or any future lease or leases to be taken of the said leasehold premises when and as the same shall become renewable as aforesaid (*c*). And I further declare, that it shall not be incumbent on any mortgagee or mortgagees of the said leasehold premises to inquire into or ascertain the necessity or propriety of any mortgage or mortgages made or executed or purporting to be made or executed by the said trustees

To pay rents and perform covenants of lease.

To raise money to renew.

And to renew,

(*c*) It seems advisable, for the reasons pointed out in a former volume, (*Vide ante*, Vol. 9, p. 349), that clauses directing tenants for life or trustees to renew leases should not be so framed as to make it imperative on them to submit to unreasonable terms. A discretion on the subject might be given in the present instance by such a clause as the following:

As to giving trustees a discretion in regard to renewals.

"Nevertheless, I hereby declare, that the trusts and directions hereinbefore contained shall not render it imperative or obligatory on the said trustees or trustee to renew the lease or leases by which the said leasehold premises shall for the time being be holden when and as the same shall become renewable, if the lessors shall demand or require a fine or premium for the granting thereof which the said trustees or trustee shall deem to be excessive and unreasonable."

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or trustee, by virtue of the power in that behalf hereinbefore contained. And I direct and declare, that, subject to the aforesaid trusts, the said trustees and trustee shall stand and be possessed of the said leasehold premises, In trust for such son of my body living at the time of my decease as shall first or alone attain the age of twenty-one years, for his absolute use and benefit. And if I shall have no son living at my decease who shall attain the age of twenty-one years, then In trust for such daughter of my body living at my decease as shall first or alone attain the age of twenty-one years or marry under that age, with the consent in writing of her guardian or guardians for the time being, for the absolute use and benefit of such daughter; yet so that an elder daughter attaining the age of twenty-one years, or marrying under that age, with such consent as aforesaid, shall take in preference to a younger daughter who may happen to marry with such consent as aforesaid before such elder daughter shall so attain the age of twenty-one years or marry. And I declare, that if I shall not have any son living at my decease who shall attain the age of twenty-one years, or any daughter who shall attain the age of twenty-one years or marry, with such consent as aforesaid, then, and in such case, as to, for, and concerning the said leasehold premises, from and after such default or failure of children of my body as aforesaid, In trust for my said wife [*name*], for her absolute use and benefit. Provided always, and I declare, that in the meantime and until the said leasehold premises hereinbefore by me bequeathed shall vest absolutely, under the trusts aforesaid, in any son or daughter of mine, or until there shall be a failure or default of children of mine, entitled in expectancy under the trusts aforesaid, the said trustees and trustee do and shall from time to time receive the rents and profits of the said premises, and lay out and invest the same or so much and such part thereof as shall not be wanted for any of the purposes hereinbefore declared concerning the same, in their or his names or name in any of the parliamentary stocks or public funds of Great Britain and Ireland, or at interest upon government or real securities in England, and do and shall receive the interest, dividends, and annual produce of the said last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature, (with

subject to the aforesaid trusts.

In trust for such son of testator as shall first attain twenty-one.

If no such son, In trust for such daughter as shall first attain twenty-one or marry.

If no such son or daughter,

In trust for his wife absolutely.

Power to accumulate rents during minorities, and to invest the accumulations in the purchase of lands.

power to alter and vary the said stocks, funds, and securities from time to time as occasion shall require), and do and shall from time to time repeat such investments so that all the resulting income and produce for the time being may, during such suspense as aforesaid, accumulate in the way of compound interest, and do and shall, at the end of such period of accumulation, convert the said accumulated fund into money, and lay out or invest such money in the purchase of freehold estates of inheritance, to be situate in England, or of copyhold estates of inheritance convenient to be held therewith, or with the estates hereinafter devised. And I direct and declare, that the said trustees and trustee shall stand seised and possessed of the estates so to be purchased as aforesaid, upon the trusts, for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinafter expressed concerning the freehold and copyhold hereditaments hereinafter devised, or as near thereto as the nature or quality of the tenure and intervening circumstances will then admit of.

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Power to apply any part of the accumulations during minorities towards paying the fines on renewals.

PROVIDED ALWAYS, and I declare, that it shall be lawful for my said trustees or trustee for the time being, at any time or times during such period of accumulation, or after the determination thereof, to apply all or any part of the said accumulated fund in payment of the fine or fines or other expenses of any such renewal or renewals of lease as aforesaid, or of any mortgage debt or debts which shall or may have been previously created for the purpose of enabling the said trustees or trustee to effect the same renewal or renewals respectively.

Power to sell,

PROVIDED ALSO, and I hereby further declare, that it shall be lawful for the said trustees and trustee for the time being, at any time or times hereafter, to make sale and dispose of the said —— and premises hereinbefore by me bequeathed, or any part thereof, either together or in parcels, and either by public sale or auction or by private contract;

and to invest the money, arising from the sale in the purchase of other lands.

AND I FURTHER DECLARE, that when all or any part of the said —— and premises shall be so sold, the said trustees and trustee shall, with all convenient speed, lay out and invest the money to arise by such sale or sales in the purchase of freehold hereditaments in fee simple in possession, to be situate in that part of Great Britain called England, held for a clear indefeasible estate of inheritance, or of copyhold estates of inheritance convenient to be held with the here-

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ditaments so to be purchased, and do and shall stand and be seised of the hereditaments so to be purchased, upon such and the same trusts and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, and declarations as are hereinbefore by me expressed concerning the said —— and premises by me bequeathed as aforesaid, or as near thereto as the nature and quality of the tenure and intervening circumstances will then admit of.

Upon the same trusts.

Until such purchases are made, the money to be invested in government or real securities.

And further, that until the money arising by such sale or sales as aforesaid shall be disposed of in the manner hereinbefore mentioned, it shall be lawful for the said trustees and trustee for the time being to place out such sum or sums of money at interest, either in the parliamentary stocks or public funds of Great Britain and Ireland, or upon government or real securities in England, in the names or name of such trustees or trustee; and to alter and vary the said stocks, funds, and securities as occasion shall require; and that the interest, dividends, and annual produce arising from such stocks, funds, and securities shall go and be paid to such person or persons, and be applied to, for, and upon such trusts, intents, and purposes, and in such manner as the rents and profits of the said hereditaments to be purchased therewith would go or be payable or applicable in case such purchase or purchases as aforesaid were then actually made.

Devise of freeholds.

I give and devise all that my manor of ——, in the county of ——, and also all that my undivided moiety or equal half part of certain messuages and hereditaments, situate in the parish of ——, in the county of ——, and all other my freehold messuages, lands, tenements, and hereditaments whatsoever, whether in possession, reversion, remainder, or expectancy (except such estates as are vested in me as mortgagee or trustee), to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same, that is to say, *To the use*, intent, and purpose, that my said wife [*name*], or her assigns, in case she shall survive me, shall and may receive and take during her natural life one annual sum or yearly rent charge of £—— of money of Great Britain and Ireland, to be charged upon and issuing out of the freehold hereditaments hereinbefore devised, and to be paid at or in the —— of ——, in the county of ——, by equal quarterly payments, on the ——

To the intent that testator's wife may receive a rent-charge of £—— during life;

day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year, without any deduction whatsoever on account of present or future taxes, or of any other matter, cause, or thing whatsoever; the first quarterly payment of the said yearly rent-charge to be made on such of the said days of payment as shall happen next after my decease, if my said wife shall be then living. *And to the further use, intent, and purpose*, that when and so often as the said annual sum or yearly rent charge of £——, or any part thereof, shall at any time or times be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then, and in every such case, it shall be lawful for my said wife, or her assigns, to enter into and distrain upon the hereditaments hereinbefore devised, or any part thereof, and to dispose of the distress and distresses then and there found according to law, to the intent that thereby or otherwise the said annual sum or yearly rent charge of £——, and every part thereof so in arrear, and all expenses occasioned by the nonpayment thereof, may be fully satisfied. *And to the further use, intent, and purpose*, that when and so often as the said annual sum or yearly rent charge of £——, or any part thereof, shall at any time or times be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then and in every such case (although there shall not have been any legal demand made thereof) (*d*), it shall be lawful for my said wife or her assigns to enter into and upon and hold the said hereditaments hereinbefore devised, or any part thereof, and to receive the rents and profits thereof for her or their own use, until she or they shall thereby or therewith or otherwise be fully satisfied the said annual sum or yearly rent charge of £——, and the arrears thereof due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises, together with all expenses which she or they shall sustain by reason of the nonpayment thereof, and such possession when taken to be without impeachment of waste. *And to the further use, intent, and purpose*, that my said wife, or her assigns, in case she shall survive me, shall and

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to be payable quarterly.

Power to distrain.

Power to enter.

To the further intent that testator's wife

(*d*) The words "dispensing with the demand" are unnecessary. *Doe* v. *Horsley*, 3 Nev. & Man. 567.

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may during so long as she shall continue my widow and unmarried after my decease receive the further annual sum or yearly rent charge of £—— of like lawful money of Great Britain and Ireland, to be charged upon and issuing out of the said hereditaments hereinbefore devised, and to be paid quarterly at the place and on or at the days or times, and without deduction for present or future taxes, and otherwise in such manner as is hereinbefore mentioned and appointed for the payment of the said annual sum or yearly rent charge of £——; the first quarterly payment of the said annual sum or yearly rent charge of £—— to be made on such of the said quarterly days of payment as shall happen next after my decease, in case my wife shall be then living and shall continue my widow. *And to the further use, intent, and purpose*, that when and so often as the said annual sum or yearly rent charge of £——, or any part thereof, shall be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then and in every such case my said wife and her assigns shall and may, for the recovery thereof, and of all expenses occasioned by the nonpayment thereof, have and enjoy such and the like powers of distraining upon all or any of the hereditaments hereby charged with the payment of the same as are hereinbefore limited to and provided for her my said wife and her assigns, for enabling her and them to recover and enforce the payment of the said annual sum or yearly rent charge of £——, and the expenses to be occasioned by the nonpayment thereof. *And also*, that when and so often as the said annual sum or yearly rent charge of £——, or any part thereof, shall be in arrear or unpaid by the space of —— days next after any of the days hereinbefore appointed for payment of the same, then and in every such case my said wife and her assigns shall and may, for compelling payment and obtaining satisfaction of the same, together with such expenses as aforesaid, have and enjoy such and the like powers of entering upon and detaining the possession, and receiving and taking the rents and profits of all or any of the said hereditaments charged with the payment of the same as hereinbefore are limited to or for her my said wife and her assigns, for enabling her and them to recover payment and obtain satisfaction of and for the said annual sum or yearly rent charge of £——, and

may receive an additional rent-charge of £—— during widowhood,

with a like power to distrain,

and to enter.

the expenses to be occasioned by the nonpayment thereof (*e*). AND as to, for, and concerning all and singular the said freehold hereditaments hereinbefore devised, subject and charged as aforesaid, *To the use* of my only son [*name*], and his assigns, during his life, without impeachment of waste; and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, *To the use* of the said [*trustees*] and their heirs during the life of my said son, UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited from being defeated or destroyed, but to permit and suffer my said son and his assigns during his life to receive the rents and profits of the said hereditaments for his and their proper use and benefit; and from and immediately after the decease of my said son, *To the use* of the first and every other son of my said son [*son*] successively, and the heirs male of the body of every such son; and in default of such issue, *To the use* of

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Subject thereto, to testator's only son for his life; remainder,

To trustees to preserve, remainder

To first and other sons of testator's son in tail male; remainder,

As to limiting a term of years to trustees to secure a rent-charge.

(*e*) It will be observed, that the rent charges to the testator's wife are not secured by a term of years. It does not appear to be quite so usual in wills as in settlements to limit terms for securing rent charges, though there seems to be no material ground for any distinction between them. Where the annual value of the lands charged greatly exceeds the burthen, it is of course less important that the rent should be accompanied by the limitation of an estate, than where the surplus is inconsiderable. The principal advantage is, that the trustees having the immediate reversion are enabled to receive the rent accruing under any subsisting demises, for it is to be remembered, that the powers of distress and entry conferred by the present will would be inoperative against tenants holding under any demises subsisting at the time of the testator's decease. The situation of the property, therefore, in respect to tenants' holdings, &c., is often proper to be taken into consideration in determining the propriety of vesting in trustees a term of years to secure a rent charge. But even supposing the exercise of the powers of distress and entry not to be impeded by any existing tenancy, trustees entering by virtue of an estate might more conveniently deal with the lands in regard to letting, &c., than the owner of a rent charge taking possession under a power of entry. In order to secure to the widow these advantages in the present case, the devise to the testator's eldest son for life should be preceded by a limitation to trustees for 100 years, upon trusts similar to those which will be found in the precedent of a settlement, *ante*, Vol. 9, p. 251, and such limitation should be followed by a proviso for cesser similar to that in Vol. 9, p. 256.

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each of my other sons lawfully begotten or to be begotten during the term of his natural life, without impeachment of waste; and after his decease, *To the use* of the first and every other son successively of each such other son, and the heirs male of the body of such first and every other son; so that the elder of my said other sons and his first and other sons successively in tail male may be preferred to and take before the younger of my said other sons and his and their first and other sons in tail male; and after the determination of the estate for life of each of my said other sons by forfeiture or otherwise in his lifetime, *To the use* of the said [*trustees*] and their heirs during the life of such son, UPON TRUST, by the ways and means aforesaid, to preserve the contingent remainders expectant upon his life estate from being defeated or destroyed, but to permit such son and his assigns during his life to receive the rents and profits of the said hereditaments for his and their proper use and benefit; and after the determination or failure of the several estates hereinbefore limited as aforesaid, *To the use* of the first and every other son of my said son [*name*] successively, and the heirs of the body of every such son; with remainder, *To the use* of the first and every other daughter of the said [*son*] successively, and the heirs of the body of every such daughter; with remainder, *To the use* of the first and every other son successively of the second and every other subsequently born son of my body, and the heirs of the body of every such son; with remainder, *To the use* of the first and every other daughter successively of the second and every other subsequently born son of my body, and the heirs of the body of every such son (*f*), so that the first and every other son, and

to each of testator's other sons for life, and to their sons successively in tail male;

so that the elder of such sons and his sons be preferred to the younger and their sons; remainder,

To trustees to preserve, remainder,

To sons of testator's first son successively in tail general; remainder,

To daughters of testator's first son successively in tail general; remainder,

To first and other sons; remainder to first and other daughters in tail general of testator's second and other sons.

As to the order in which the several stocks or classes of issue are admitted.

(*f*) The limitations in the text admit the several stocks and classes of issue in the following order, namely, the testator's eldest son and his first and other sons, the latter taking estates in tail *male;* next, the younger sons and their sons, the latter also taking estates in tail *male;* next, the sons and daughters in succession of the testator's eldest son take estates tail *general;* next, the sons and daughters also in succession of the testator's younger sons take estates tail *general;* next are admitted the eldest and other daughters of the testator and their first and other sons, the latter taking estates in tail *general;* and lastly, the first and other daughters of testator's *daughters* take estates in tail *general.* These limitations embrace the whole line of the testator's descendants.

the first and every other daughter of the elder of my said second and other subsequently born sons, as tenants in tail general as aforesaid, may take before and be preferred to the first and other sons in tail general and the first and other daughters in tail general of the younger of my said second and other subsequently born sons; and after the determination or failure of the several estates hereinbefore limited as aforesaid, *To the use* of the said [*trustees*], and their heirs, during the life of my daughter [*name*], UPON TRUST to preserve the contingent remainders hereinafter limited, and also UPON TRUST that the said trustees and trustee do and shall, during the life of my said daughter, pay the yearly rents and profits of the said hereditaments unto such person or persons, and for such intents and purposes, as my said daughter, by any writing or writings under her hand, notwithstanding any coverture, shall from time to time, but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise in the way of anticipation (*g*), direct or appoint; and for want of such direction or appointment, into her own hands for her own separate use and benefit, and without being in anywise subject or liable to the debts, control, or interference of any husband; and the receipts of her my said daughter, or of such person or persons as she shall from time to time appoint to receive such rents and profits, to be effectual discharges for the same; AND after the decease of my said daughter, *To the use* of the first and every other son of my said daughter successively, and the heirs male of the body of every such son; with remainder *To the use* of the first and every other son of my said daughter successively, and the heirs of the body of every such son; with remainder *To the use* of the first and every other daughter of my said daughter successively, and the heirs of the body of every such daughter; with remainder *To the use* of the said [*trustees*], and their heirs, during the life of each of my other daughters, UPON TRUST to preserve the contingent remainders hereinafter limited, and also UPON TRUST, that the said trustees and trustee do and shall, during the life of such daughter, pay the yearly rents and profits of all and singular

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In default of such issue,

To the use of trustees during the life of testator's daughter, to preserve, and to pay rents to her for her separate use, without power of anticipation.

After her decease, to her first and other sons in tail male; remainder

to her first and other sons in tail general; remainder

to her first and other daughters in tail general; remainder

to trustees during the life of each of testator's other daughters, to preserve, and to pay rents to them for their separate use,

(*g*) *Vide ante*, Vol. 9, p. 362; also note, *post*, *vide* Index to this volume, title "Separate Use."

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the said freehold hereditaments unto such person or persons, and for such intents and purposes as such daughter, by any writing or writings under her hand, notwithstanding any coverture, shall from time to time, but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise in the way of anticipation, direct or appoint; and for want of such direction or appointment, into the hands of such daughter for her own separate use and benefit, and without being in anywise subject or liable to the debts or control of any husband; and the receipts of such daughter, or of such person or persons as she shall from time to time direct to receive such rents and profits to be effectual discharges for the same. And after the decease of each such daughter respectively, *To the use* of her first and every other son successively, and the heirs male of the body of every such son; with remainder *To the use* of the first and every other son successively of each such daughter, and the heirs of the body of every such son; with remainder *To the use* of her first and every other daughter successively, and the heirs of the body of every such daughter; so that the estate hereinbefore limited to the said trustees and their heirs during the life of the elder of my second and other subsequently born daughters, and to her first and other sons successively in tail male, and to her first and other sons successively in tail general, and to her first and other daughters successively in tail general, shall have precedence to and take effect before the estates limited to the said trustees and their heirs during the life and lives of the younger of my second and other subsequently born daughters, and her and their first and other sons successively in tail male, and her and their first and other sons successively in tail general, and her and their first and other daughters successively in tail general. And from and after the determination or failure of the several estates hereinbefore limited as aforesaid, *To the use* of the said [*trustees*], and their heirs and assigns, for ever, upon the trusts hereinafter declared of or concerning the same (that is to say), Upon trust, that they the said [*trustees*], or the survivors or survivor of them, their or his heirs or assigns, do and shall, (subject and without prejudice to the several yearly rent charges hereinbefore limited, or such as for the time being shall be subsisting) by mortgage or sale of all or any part of the said hereditaments hereinbefore devised, or by

without power of anticipation;

And after the decease of each such daughter, to her first and other sons in tail male; remainder,

to her first and other sons in tail general; remainder,

to her first and other daughters in tail general; every elder daughter and her sons to take precedence of the younger daughters and their sons; remainder,

to the use of trustees in fee, Upon trust to raise £—— by mortgage or sale,

any other reasonable ways or means, levy and raise the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate of 4*l.* per centum per annum, computed from the time at which the use or estate lastly hereby limited to the said [*trustees*], their heirs and assigns, shall take effect in possession, and pay, share, and divide the same sum of £——, and interest, unto, between and amongst the daughter or daughters of my niece [*name*], now residing at ——, (if any), who shall be then living; if more than one, in equal shares; and as to the said hereditaments (subject to and charged with the payment of the said sum of £—— and interest), IN TRUST for [*names*], of &c., their heirs and assigns, for ever, as tenants in common, and not as joint tenants. PROVIDED ALWAYS, and I declare, that during the minority of my said son [*name*], and during the minority or respective minorities of any other of my sons or more remote descendants, being males, who, under the limitations hereinbefore contained, shall come into the actual possession of or be entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised, and during the minority and discoverture or respective minorities and discovertures of any of my daughters or more remote descendants, being females, who, under the said limitations, shall come into the actual possession of or be entitled to the receipt of the said rents and profits, it shall be lawful for the said trustees and trustee, (but subject and without prejudice to the several rent charges hereinbefore limited, or such of them as shall be subsisting) during every such minority, or minority and discoverture, as the case may be, to receive the rents and profits of the said hereditaments, or of such part thereof as such minor or minors may happen to be entitled to therein, and to apply an adequate part of such rents and profits, in their or his discretion, in the maintenance, education, or advancement of my said son [*name*], or of such others of my sons or daughters or issue, as shall for the time being, under the limitations aforesaid, be in the actual possession, or be entitled to the rents and profits of the same hereditaments, or, in the discretion of the said trustees or trustee, to pay such rents and profits, or an adequate part thereof, as aforesaid, to the guardian or guardians for the time being of the said minor or minors respectively, to be applied for such maintenance, education, and advancement as aforesaid, without any obligation on the part of my

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and divide same among the daughters of testator's niece.

Ultimate trust for collateral relations.

Power to trustees during minorities to apply part of the rents for maintenance, and to accumulate residue,

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said trustees or trustee to see to the application thereof; and from time to time to lay out and invest the surplus or residue of the said rents and profits in their or his names or name in the parliamentary stocks or public funds of Great Britain and Ireland, or at interest upon government or real security in England, and to receive the interest, dividends, and annual produce of the said last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature (the said trustees altering, varying, and transposing the said stocks, funds, and securities from time to time as occasion shall require), and from time to time to repeat such investments, so that all the resulting income and produce for the time being may, during every such minority, or minority and discoverture, as aforesaid, accumulate in the way of compound interest; and at the end of every such period of accumulation, or sooner, if deemed expedient, to convert the said accumulated fund into money, and lay out or invest the money arising thereby in the purchase of freehold or copyhold estates of inheritance in England. And I direct and declare, that the estates so to be purchased as aforesaid shall be assured and settled *To the uses*, upon the trusts, for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore expressed concerning the said hereditaments hereinbefore devised, or as near thereto as the nature or quality of the property, and intervening circumstances, will then admit of. Provided nevertheless, and I hereby direct and declare, that the trust or direction hereinbefore contained concerning the accumulation of the surplus of the rents and profits arising from the said hereditaments hereinbefore devised, shall not continue or endure beyond the period of twenty-one years, computed from the day of my decease (*h*); and that from and after the expiration of the said term of twenty-one years, the whole of the residue or surplus of such rents and profits which shall remain unapplied to such maintenance, education, and advancement as aforesaid, shall go and belong to the person or persons during whose minority or respective minorities,

and invest such accumulations in purchases, to be settled to the same uses.

Accumulating trust restrained to twenty-one years from testator's decease.

(*h*) This proviso is added, in order to bring the trust for accumulation within the limits prescribed by the stat. 39 & 40 Geo. 3, c. 98, stated *ante*, p. 65.

or minority and discoverture, or respective minorities and discovertures, as the case may be, the same shall have arisen as aforesaid, in like manner as the same would have gone and been applicable if the said trust for accumulation had not been contained or inserted in this my will (*i*). PRO-

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Power for sons

(*i*) It is usual to confine jointuring powers to tenants for life in actual possession; hence it happens that such a remainder-man for life is unable to secure an absolute provision by way of jointure to an intended wife, as any such jointure would not take effect unless he lived to become entitled in possession. The restriction, indeed, even precludes a remainder-man whose estate does eventually take effect in possession from previously making an effectual legal jointure; but the intended husband in such case might make a good jointure in equity, by way of covenant, which a Court of equity would compel him to perform, and, if he died (after having become entitled in possession,) without perfecting the jointure, would make good the appointment against the persons entitled in remainder. See Sugd. Pow. 5th ed. 373. The power clearly ought to be exercisable as well before as after the remainder vests in possession, and should even, it is conceived, be independent of the contingency of the donee coming into possession at all; for, suppose that lands are limited to A. for life, with remainder to his issue in strict settlement, with remainder to B. and his issue in like manner, with remainder to C. and his issue in like manner; during the life of A., B. marries, and afterwards dies, leaving his wife and issue inheritable under his remainder in tail; A. afterwards dies without issue: upon which the eldest son of B., the deceased remainder-man, becomes entitled as tenant in tail in possession, free, of course, (if the jointuring power was restricted to tenants for life *in possession*) from any jointure to his mother. But why, it may be asked, should the accident of the donee having died before his remainder fell into possession deprive his widow of her jointure? Such a restriction detracts greatly from the value of the power.

As to extending jointuring powers to persons not in possession.

Though, in our suppositious case, B. is made to leave issue by his surviving wife, yet even this circumstance does not seem properly to constitute an essential ingredient. The appointed jointure should override *all* the estates posterior to the estate for life of the donee without distinction, though such donee not only should not have been entitled in possession when he exercises the power, but should never afterwards become so entitled; care, of course, being taken that it is not made to affect any estate antecedent to his own, to guard against which possibly may have been originally the motive for confining the power to tenants for life in possession, though it is obvious that the protection of the prior estates did not require such an inconvenient restriction on the power. It is only necessary for this purpose, that the appointed jointure should be pre-

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when in possession to jointure.

VIDED ALWAYS, and I hereby declare, that it shall be lawful for each and every son of mine*, who, by virtue of the limitations hereinbefore contained, shall for the time being be in the actual possession of or entitled to the receipt of the rents and profits of the hereditaments hereby devised, at any time or times, or from time to time, either before or after marriage, by any deed or deeds, instrument or instruments in writing, revocable or irrevocable, to be sealed and delivered by him in the presence of and attested by one witness or more, or by his last will and testament in writing, or any writing in the nature thereof (*k*) (but subject and without prejudice to the several rent charges hereinbefore created, or

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vented from taking effect in possession unless in the same events as those in which the donee's own estate would so take effect. In order to adapt the precedent in the text to the suggested extension of the power, the words within the two asterisks should be omitted, and the following substituted:

Variation where the jointuring power is exercisable by tenants for life not in possession, and who never become entitled in possession,

" whether such son shall or shall not eventually become entitled to the actual possession of or the receipt of the rents and profits of the hereditaments hereinbefore devised (but subject and without prejudice to the estates, charges, and powers antecedent to the estate for life of such son), by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and attested by one or more witness or witnesses, or by his last will and testament in writing, or any writing in the nature thereof, to limit and appoint," &c.

—where by persons then or subsequently entitled in possession.

If it is intended that the power, though exercisable before, should still depend upon the contingency of the donee (or the donee or any of his issue, as the case may be) eventually becoming entitled in possession, then, instead of the clause just suggested, substitute the following:

" who (or any of whose issue, *as the case may be*) shall, by virtue of the limitations hereinbefore contained, become entitled to the actual possession or the receipt of the rents and profits of the freehold hereditaments hereinbefore devised, either before or after he shall so become entitled (but subject and without prejudice to the estates, charges, and powers antecedent to the estate for life of such son), by any deed or deeds," &c.

(*k*) Powers to jointure are often restricted to appointments *by deed*, but they clearly ought to be made exercisable *by will* also.

such of them as shall be subsisting), to limit and appoint *to the use of or in trust for any and every wife whom such son shall have married, or shall or may thereafter marry, for her life and for her jointure, and in bar or without being in bar of dower, any annual sum or sums of money, or yearly rent charge or charges, not exceeding in the whole the yearly sum of £—— of lawful money of Great Britain and Ireland, to be issuing out of and charged upon all or any of the said hereditaments, clear of all present or future taxes and outgoings whatsoever, and to be paid in such manner as to such son shall seem meet; And for the purpose of securing the annual sum or yearly rent charge, or annual sums or yearly rent charges, so to be appointed as aforesaid, to limit and appoint the usual powers and remedies for recovering and enforcing payment thereof respectively, by distress and entry upon and perception of the rents and profits of the said hereditaments so to be charged with the said annual sum or yearly rent charge, or annual sums or yearly rent charges; and also to limit and appoint the hereditaments so to be charged as aforesaid, (but subject and without prejudice as aforesaid), to any person or persons whomsoever, for any term or terms of years, as to the person exercising this present power shall seem meet; but so that any and every such term of years (if any such shall be limited) be made to determine on the death of the woman for the benefit of whom the same shall be created, and the payment of the arrears of her rent charge or rent charges, and the expenses incurred by the nonpayment thereof respectively. PROVIDED NEVERTHELESS, and I hereby declare (*l*), that the said hereditaments hereby devised shall not, under or by virtue of the power of jointuring hereinbefore contained, be at any one time subject

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with the usual powers of distress and entry;

and also to create terms of years for securing jointures.

Proviso limiting the amount of jointures in the whole to a given sum.

(*l*) Add, if the power is extended to persons not entitled, and who never become entitled in possession:

Variation where power is exercisable by persons not in possession.

"that no jointure or jointures to be created or appointed by virtue of this present power shall take effect in possession, unless the person exercising such power shall actually become entitled in possession to the said hereditaments hereby devised by virtue of the limitations hereinbefore contained, or would, if he had been living, have become so entitled. PROVIDED ALSO, and I further declare,"

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or liable to the payment of any jointure or jointures exceeding in the whole the annual sum of £——, so that if by virtue or means of the aforesaid power of jointuring, the same hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole than £——, the payment of the annual sum occasioning such excess, or such part thereof as occasions the same, shall, during the time of such excess, be suspended. PROVIDED ALSO, and I hereby further declare, that it shall be lawful for each and every daughter of mine, who, by virtue of the limitations hereinbefore contained, shall for the time being be beneficially entitled to the possession of or to the receipt of the rents and profits of the hereditaments hereby devised as aforesaid, at any time or times, and from time to time, whether sole or covert, by any deed or deeds, instrument or instruments in writing, revocable or irrevocable, to be sealed and delivered by such daughter in the presence of and attested by one witness or more, or by her last will and testament in writing, or any writing in the nature thereof (but subject and without prejudice as aforesaid), to limit and appoint the said hereditaments, or any part thereof, to the use of or in trust for any and every husband whom such daughter shall have married or shall or may thereafter marry, for his life, or any yearly rent charge or charges issuing out of the said hereditaments, to be paid in such manner during the life of such husband, as to such daughter of mine shall seem meet, with such powers and remedies for recovering and enforcing payment thereof as are hereby authorized to be created by the power of jointuring hereinbefore contained; but so nevertheless, and I hereby expressly declare, that no estate or rent charge to be created or limited by virtue of this present power, shall take effect in possession until the decease of the daughter exercising the same (*m*). PROVIDED ALSO, and I hereby further

Power to daughters in possession to limit life estates or rent charges to husbands.

Power to sons

(*m*) Add, if the power is extended to persons not entitled, and who never become entitled in possession:

Variation where power is exercisable by persons not in possession.

"nor unless such daughter shall become actually entitled in possession to the said hereditaments hereby devised by virtue of the limitations aforesaid, or would, if she were living, have become so entitled."

declare, that it shall be lawful for each and every son and daughter of mine, who, by virtue of the limitations hereinbefore contained, shall for the time being be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised (*n*), (any such daughter being either covert or sole), by any deed or deeds, instrument or instruments in writing, revocable or irrevocable, and to be by him or her respectively sealed and delivered in the presence of and attested by one or more witness or witnesses, or by his or her respective last will and testament in writing, or any codicil or writing in the nature thereof (but subject and without prejudice as lastly hereinbefore is mentioned), to subject or charge all or any part of the said hereditaments hereinbefore devised to and with the payment of any sum or sums of money for the portion or portions of all or any child or children of the person for the time being exercising this present power (other than or besides an eldest or only son for the time being entitled, under the limitations hereinbefore contained, to the said hereditaments for an estate in tail male in possession or in remainder expectant on the decease of his parent), not exceeding in the whole the sum or sums of money hereinafter mentioned, (that is to say), if such person shall have no son who shall attain the age of twenty-one years, or die under that age leaving issue male living at his decease, then with any sum or sums of money not exceeding £—— a piece for the portion or portions of his or her daughter or daughters respectively; but if such person shall have a son who shall attain the age of twenty-one years, or die under that age leaving issue male of his body living at his decease, then with any sum or sums of money not exceeding £—— (*o*) a piece for the portion or portions of his or her daughter or daughters, and younger son or younger sons respectively, with interest for the same sum or sums of money respectively, at any rate not exceeding 4*l.* for 100*l.* by the year; to be paid to or shared and di-

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and daughters in possession to charge with portions for younger children.

The amount to be regulated by the number of children.

(*n*) The observations before made (*ante*, p. 397), as to the power of jointuring, apply to the power to charge portions: the phraseology of which may be varied in the manner suggested in regard to the first-mentioned power.

(*o*) The amount, of course, is reduced in this event.

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vided between or among such child or children, or any one or more of them, at such age, day, or time, or respective ages, days, or times, and with such provisions for maintenance and advancement in the meantime, and if more than one, in such shares and proportions, and with such annual sum or sums of money, conditions, restrictions, and limitations over (such annual sum or sums of money and limitations over being for the benefit of one or more such child or children respectively), as to the person making each such charge respectively shall seem meet: AND THAT, for the purpose of raising such portion or portions and interest on the same respectively, it shall be lawful for the person making each or any such charge as lastly hereinbefore is mentioned, by the same or any other deed or deeds, instrument or instruments in writing, so sealed and delivered and attested as aforesaid, or by such last will and testament, or any writing in the nature thereof as aforesaid, to limit and appoint (but subject and without prejudice, as lastly hereinbefore is mentioned,) all or any part of the hereditaments so to be charged as lastly hereinbefore is mentioned to any person or persons whomsoever, for any term or terms of years whatsoever, without impeachment of waste, Upon trust to raise the money so to be charged, by way of mortgage; so that the estate or estates so to be created be made to cease or be redeemable on full payment of the sum or sums of money so to be charged and the interest thereof, by the person or persons who for the time being shall be entitled to the freehold and inheritance of the premises so to be limited and appointed. PROVIDED ALSO, and I hereby declare, that the said hereditaments shall not, under or by virtue of the power hereinbefore in that behalf contained, be liable to the payment of any larger sum or sums of money for portions than the sum of £—— in the whole. PROVIDED ALWAYS, and I hereby declare, that it shall be lawful for my sons and daughters severally, as and when, by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised, and also for the trustees and trustee for the time being of this my will, from time to time, and at all times during the minority of any son or daughter of mine for the time being entitled in possession as aforesaid,

And to limit the devised lands for any terms of years, upon trust to raise the portions by sale or mortgage.

Proviso limiting the amount of portions in the whole to a given sum.

Power of leasing reserved to tenants for life and trustees.

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or of the issue of any such sons or daughters respectively, who, by virtue of any of the limitations aforesaid, shall be entitled to any estate in tail male or in tail general in possession of and in the said hereditaments, or any part or share thereof, by indenture duly executed, to demise or lease all or any part or parts of the said hereditaments hereinbefore devised to any person or persons for any term or number of years absolute, not exceeding —— years, to take effect in possession and not in reversion or by way of future interest; so that there be reserved on every such lease the most improved yearly rent or rents to be incident to the immediate reversion of the said hereditaments, and no fine, premium, or foregift be taken for the making thereof, and so that there be contained in every such lease a condition of re-entry for nonpayment of rent, and so that the respective lessees be not made dispunishable for waste, or exempted from punishment for committing waste. PROVIDED ALSO, and I hereby further declare, that it shall be lawful for the person or persons to whom the power of leasing lastly hereinbefore contained is reserved and given, at any time or times, and from time to time, to grant to any customary or copyhold tenant or tenants of my said manor of ——, such licence or licences to demise or lease for any term not exceeding —— years in possession, all or any part of the messuages, lands, tenements, and hereditaments holden by such tenant or tenants respectively by copy of court roll of the said manor, as the person or persons exercising this present power shall think proper; so that such person or persons do and shall accept and take the customary fines only for granting such licence or licences, and do and shall in all other respects conform to the custom of the said manor in relation thereto (*p*).

Power to grant licences to copyhold tenants to demise.

PROVIDED ALSO, and I further declare, that it shall be lawful for the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, at any time or times after my decease, at the request and by the direction of the person or persons who for the time being shall, by virtue of any of the limitations contained

Power to trustees to sell and exchange,

(*p*) As the lord of a manor can only grant licences to demise in respect of his estate, a power to this effect should always accompany limitations of a manor in strict settlement.

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in this my will, be in the actual possession of or entitled to the rents and profits of the said hereditaments hereinbefore devised, if such person or persons respectively shall be of full age, but if such person or persons respectively shall be under age, then during the minority or respective minorities of any such person or persons respectively, at the request and by the direction of his, her, or their guardian or guardians, such request to be signified by some writing or writings under hand and seal, (either alone or in conjunction with the other person or persons so entitled as aforesaid, if any, who shall be of full age, as the case may be), to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other hereditaments, to be situate in that part of Great Britain called England, or in the principality of Wales, all or any part of the said hereditaments hereinbefore devised, and the inheritance thereof in fee simple, or for other my estate or interest therein, to any person or persons whomsoever, for such price or prices in money, or such equivalent in lands or hereditaments, as to the said trustees or trustee shall seem meet;

and to enfranchise copyholds,

And also to enfranchise any copyhold or customary lands or hereditaments holden of the said manor of ——, hereinbefore devised, for such price or prices or other equivalent, as aforesaid;

and join in making partition.

And also, in the discretion and of the absolute authority of the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the said trustees or trustee for the time being, to join and concur with the person or persons for the time being entitled to the other undivided moiety or half part of the said messuages and hereditaments in the parish of ——, in the county of ——, aforesaid, or empowered to make a partition thereof, in making a partition or division of the same premises, or any of them; and on any such exchange or partition, as aforesaid, to pay any sum or sums of money for equality of exchange or partition out of the trust funds, if any shall be vested in such trustees or trustee by virtue of the trusts or powers hereinbefore contained, or to charge and secure the sum or sums of money so paid, or for the expenses of making such exchange or partition, with interest thereon, upon the hereditaments to be received or allotted as aforesaid, or to accept any sum or sums of money for equality of exchange or partition, or any similar securities or other real securities for the payment thereof, with interest; and that, for the pur-

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pose of effecting every or any such sale, disposition, exchange, enfranchisement, partition, and conveyance as aforesaid, it shall be lawful for the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, as aforesaid, at such request and by such direction and so testified as aforesaid, by any deed or deeds, or instrument or instruments in writing, sealed and delivered by them or him in the presence of and attested by one or more witness or witnesses, absolutely to revoke, determine, and make void all and every or any of the uses, trusts, powers, and provisions hereinbefore limited and expressed concerning the whole or any part or parts, parcel or parcels of the hereditaments hereinbefore devised, and by the same or any other deed or deeds, instrument or instruments in writing, to limit, declare, direct, and appoint any use or uses, estate or estates, trust or trusts of the said premises, or any part or parts, parcel or parcels thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate such sale, disposition, exchange, enfranchisement, partition, and conveyance as aforesaid. And I HEREBY DECLARE, that when all or any part of the said hereditaments hereinbefore devised shall be so sold or enfranchised for a pecuniary consideration, or any money shall be so received for equality of exchange or partition, as aforesaid, the said trustees and trustee shall, with all convenient speed, lay out and invest the same money in the purchase of manors, lands, or hereditaments in fee simple in possession, to be situate somewhere in that part of Great Britain called England, or in the principality of Wales, held for a clear and indefeasible estate of inheritance, or of copyhold lands of inheritance convenient to be held therewith or with the lands hereby devised, and which shall remain unsold by virtue of this present power; yet so as that such purchase or purchases respectively be made with the consent in writing of the person or persons who would, under or by virtue of this my will, be for the time being entitled to the possession or receipt of the rents and profits of the said lands so to be purchased or received in exchange, or allotted, as aforesaid, in case the same were then actually purchased or received in exchange, or allotted, in pursuance of the powers aforesaid, if such person or persons respectively shall be of

Direction to invest moneys in the purchase of other lands.

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full age; but if such person or persons respectively shall be under age, then during the minority or minorities of any such person or persons respectively, with the consent in writing of his, her, or their guardian or guardians respectively; And moreover, that the said trustees or trustee for the time being do and shall settle and assure, or cause to be settled and assured, as well the manors, lands, and hereditaments so to be purchased, as the manors, lands, and hereditaments to be received or taken in exchange or on any such partition as aforesaid, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, and declarations as are in and by this my will expressed concerning the said hereditaments hereinbefore devised, or as near thereto as the nature or quality of the premises and intervening circumstances will then admit of; And further, that until the money arising by such sales or enfranchisements as aforesaid, or to be received for equality of exchange or partition as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall be lawful for the said trustees and trustee for the time being, by and with the consent in writing of the person or persons who would, under or by virtue of this my will, be for the time being entitled to the possession or receipt of the rents and profits of the hereditaments so to be purchased or received in exchange or on partition as aforesaid, in case the same were then actually purchased or received in exchange or on partition in pursuance of the powers aforesaid, if such person or persons respectively shall be of full age; but if such person or persons respectively shall be under age, during the minority or minorities of any such person or persons respectively, with the consent in writing of his, her, or their guardian or guardians respectively, to place out such sum or sums of money at interest, either in the parliamentary stocks or public funds of Great Britain and Ireland, or upon government or real securities in England or Wales, in the names or name of such trustees or trustee for the time being, and to alter and vary the said stocks, funds, and securities, as occasion shall require. And I hereby declare, that the interest, dividends, and annual produce arising from such stocks, funds, and securities, shall go and be paid to such

Lands purchased or received in exchange or on partition to be conveyed to uses of settlement.

Power to invest monies arising from sale, exchanges, or partitions, upon security until purchase of lands.

person or persons, and be applied to and for such uses, intents, and purposes, and in such manner, as the rents and profits of the said hereditaments to be purchased therewith would go or be payable or applicable in case such purchase or purchases and settlement as aforesaid were then actually made. I GIVE AND DEVISE all my copyhold messuages, lands, tenements, and hereditaments whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy (except the estates vested in me as mortgagee or trustee), *To the uses*, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, conditions, and declarations hereinbefore limited and expressed concerning my manor and other freehold hereditaments hereby devised (*q*), except the clause declaring or rendering the estates of tenants for life unimpeachable for waste, and also, except the estates so as aforesaid vested in the said trustees, upon trust for preserving contingent remainders, and also, except so much of the power to grant leases hereinbefore contained as would authorize and enable the person or persons exercising the same to grant any lease or leases of the copyhold hereditaments hereinbefore devised, without the licence of the lord or lords, or lady or ladies of the manor or respective manors of which the same may happen to be holden, in conformity to the custom thereof, which licence the person or persons exercising such power is or are hereby directed to obtain, previously to the granting of any lease or leases of the said copyhold hereditaments. PROVIDED ALWAYS, and I declare, that the said annual sum or yearly rent charge of £——, hereinbefore limited to my said wife and her assigns during her life, and the said annual sum or yearly rent charge of £—— hereinbefore limited to my said wife and her assigns during her widowhood, are so respectively limited to her and them as aforesaid, upon condition that she my said wife do and

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Devise of copyholds to the uses declared of the freeholds.

Declaration that provision made for wife is upon condition of her giving up life interest under her marriage settlement.

(*q*) The reason why the testator's copyhold estates are devised by a separate clause, instead of being blended with the freeholds in one devise, are sufficiently explained by the clause itself. Where freeholds and copyholds are devised together to limitations in strict settlement, to exempt the copyholds from the parts not applicable to them greatly increases the complexity of the devise, and requires much additional care in framing the limitations.

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shall, at her own costs and charges, within the period of —— calendar months next after my decease, by such ways or means as by the said trustees or trustee for the time being, or their or his counsel, shall be directed or required, surrender and yield up, or otherwise release or dispose of the life interest of her my said wife, under the settlement executed on our marriage, in the several sums of stock in the same settlement mentioned or comprised, so and in such manner, that the interest, dividends, or annual produce of the several sums of stock may from time to time, during the life of her my said wife, be received and enjoyed by the person or persons who would for the time being have been entitled thereto, in case she were then dead. AND I HEREBY EXPRESSLY DECLARE, that in case my said wife shall refuse or neglect to make and execute such release or surrender of her life interest in the said trust funds as aforesaid, within the period aforesaid, and shall persist in such refusal or neglect for the further period of —— days after a demand or request in writing, delivered to my said wife, or left for her at her last or usual place of abode, by or on the part of my said trustees or trustee, then and in such case, from and immediately after the expiration of the said period of —— days, the said several annual sums or yearly rent charges respectively hereinbefore limited to my said wife, or such of them as shall be then subsisting, shall absolutely cease and determine, notwithstanding that my said wife shall or may, at any time thereafter, be willing and desirous to make and execute, or actually shall make and execute such release or surrender as aforesaid, any rule of equity to the contrary notwithstanding (*r*). AND I GIVE AND

In case of her neglect to do so after notice, the rent charges to cease.

Residuary bequest to trustees,

Remarks upon conditions requiring performance of an act by devisee or legatee.

(*r*) If a testator really intends to make compliance with the condition a *sine quâ non*, the intention should be placed above the possibility of misconstruction, by explicit declaration, as in the text, since points of this nature have occasioned much litigation.

Where there is no gift over, or substituted disposition, in the event of non-compliance by the prior devisee with the testator's injunction, and that injunction relates only to the payment of money, it is clear that equity will relieve against forfeiture on subsequent payment of principal, interest, and costs. *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Grimstone* v. *Lord Bruce*, 2 Ves. sen. 492. And this relief has been sometimes with

BEQUEATH all the personal estate and effects whatsoever and wheresoever, not by me specifically bequeathed, of or to which I shall be possessed or entitled at the time of my decease, unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST, as soon as conveniently may be after my decease, to collect, get in, and convert into money my said residuary personal estate, or such part thereof as shall not consist of money, or such securities for money as are hereinafter directed to be purchased; and by and with the monies arising thereby, and the money of which I shall be possessed at my decease, to pay my debts and funeral and testamentary expenses, and the legacies hereinbefore given, and also all such other legacies (if any), as I may hereafter give or bequeath by any codicil or codicils to this my will, and to lay out and invest all the surplus or residue of the said monies respectively, in their or his names or name, in the parliamentary stocks or public funds of Great Britain and Ireland, or at interest upon government or real securities in England (and which stocks, funds, and securities, and also any such of which I shall be possessed at my decease, the said trustees and trustee are and is empowered, from time to time, to alter, vary, and transpose, as occasion shall require), and to stand and be possessed of and interested in all the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon the trusts hereinafter expressed concerning the same, (that is

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Upon trust to convert into money,

and pay debts and legacies,

and invest residue in the funds or on real securities,

and stand possessed thereof,

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more doubtful propriety extended to other conditions not equally susceptible of compensation, as where the testator bequeaths a sum of money on the condition (as in the text) of the legatee executing a release within a given time. *Taylor* v. *Popham*, 1 B. C. C. 168; *Simpson* v. *Vickers*, 14 Ves. 341; *Hollinrake* v. *Lister*, 1 Russ. 500. In these cases the legatee has been allowed to take the legacy on his performing the act *after* the lapse of the prescribed period.

Where, however, there is an express gift over, in default, equitable interference is prevented by the claims of the substituted object of gift, who obviously is entitled to equal consideration with the original devisee or legatee. In such cases, therefore, equity is compelled, by its own principles, to remain neuter, leaving the prior devisee or legatee to the consequence of his contumacy or laches. *Cleaver* v. *Spurling*, 2 P. W. 426; *Simpson* v. *Vickers*, 14 Ves. 341. See also *Tulk* v. *Houlditch*, 1 Ves. & Bea. 248; *Burgess* v. *Robinson*, 1 Madd. 172, *S. C.* 3 Mer. 7.

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In trust for all testator's children, except the eldest son, or other child taking the estate.

to say), In trust for all and every the children and child of my body living at my decease (except my said son [*name*], or any other child of mine being an eldest or only son, or an eldest daughter at my decease entitled in possession under the limitations hereinbefore contained of my real estates), in manner following, (namely), if there shall be but one such child of mine, (except as aforesaid), the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, to be In trust for such only child, and to be paid or transferred to such child, being a son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years, or on the day of her marriage, with the consent of her guardian or guardians for the time being, which shall first happen; and if there shall be two or more such children, then the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, to be in trust for such two or more children, and to be divided between or among them in equal shares or proportions; and the share or shares of such of them as shall be a son or sons to be paid or transferred to him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be paid or transferred to her or them respectively at her or their age or respective ages of twenty-one years, or day or respective days of marriage, with such consent as aforesaid, which shall first happen. Provided always, and I hereby declare, that if there shall be more than one child for whom portions are hereby intended to be provided as aforesaid, and any of them, being a son or sons, shall depart this life or become an eldest or only son for the time being entitled in possession, under the limitations hereinbefore contained of my said estates, under the age of twenty-one years, or, being a daughter or daughters, shall depart this life or become an eldest daughter for the time being entitled in possession as aforesaid, under the age of twenty-one years, and without being or having been married with such consent as aforesaid, then, as well the original share intended to be hereby provided for, as the share or shares by virtue of this present clause or proviso surviving or accruing to, each such child so dying or becoming an eldest or only son or an eldest daughter for the time being entitled as aforesaid, or so much

Clause of accruer in respect of share of any child dying or becoming an elder child during minority.

thereof as shall not have been applied for the preferment or advancement in the world of any such son, in pursuance of the power or authority hereinafter for that purpose contained, shall from time to time go, accrue, and belong to the survivors or survivor, and others or other of such children (other than my said son [*name*], or any other eldest or only son or eldest daughter for the time being entitled as aforesaid), and if more than one, in equal shares or proportions, and be paid and transferred at such and the same time or times, and in such and the same manner as his, her, or their original share or shares of and in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof is and are hereinbefore bequeathed and made payable or transferable (*s*). PROVIDED ALSO, and I hereby

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Provision for

(*s*) In framing bequests of personalty to children, the plan commonly pursued, for the sake of brevity, in these precedents has been to suspend the vesting until the age prescribed for enjoyment, instead of giving to the children on their birth vested interests, accompanied by a clause of accruer in the event of their dying before attaining such age. In the present instance, however, the latter mode is to be preferred, inasmuch as it prevents accruing shares from devolving to a younger child, who has become the eldest, in the interval between the vesting of his original share and the acquisition of such accruing share. For example, suppose that there are, at the testator's decease, four younger children; namely, A., who has attained majority, and B., C., and D., who are under age. The eldest son, after the testator's decease, dies without issue, by which event A. becomes the eldest existing son, and takes the estate; B. afterwards dies during minority. It is clear that, under such circumstances, the clause of accruer in the text would not admit A. to a participation in the share of B., he having, before such clause took effect, ceased to answer the description of younger child. On the other hand, if the original trust had been so framed as to embrace such children only (other than an eldest son), as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, A., having attained the prescribed age, would have been entitled on the death of B., notwithstanding his having antecedently become the eldest son, to a share of that part of the fund which became distributable on B.'s death, *as part of his* (*A.'s*) *original share*, such share having previously vested in him as a younger son of the testator, though with a deferred enjoyment, during the life of B., of that portion of it which was included in the presumptive share of B. while he continued an expectant member of the class. This evidently would be contrary to the intention.

Remarks upon the clause of accruer.

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maintenance during minority.

declare, that, in the meantime and until my said child or children respectively, for whom a portion or portions is or are intended to be hereby provided under the trusts hereinbefore declared of my said residuary personal estate, shall become entitled to the payment or transfer of his, her, or their portion or portions respectively, the said trustees and trustee do and shall pay or apply all or any part of the interest, dividends, and annual produce of the portion or portions to which any such child or children shall or may for the time being be entitled in expectancy under the trusts aforesaid for or towards his, her, or their maintenance and education respectively. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees and trustee, at any time or times before the age or period of payment or transfer of the portion or portions hereinbefore provided for my son or sons respectively (except as aforesaid), at their or his discretion, to pay and apply any part or parts, not exceeding one moiety or equal half part of the portion or portions to which any such son or sons shall or may for the time being be entitled in expectancy under the trusts aforesaid, for or towards his or their advancement or establishment in the world respectively. PROVIDED ALSO, and I further declare, that if I shall have no child living at my decease, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, with such consent as aforesaid (other than an only son or daughter for the time being entitled as aforesaid), then and in such case the whole of the aforesaid trust monies, stocks, funds, and securities, or such part thereof as shall not be applied or disposed of under the power of advancement hereinbefore contained, shall go and be IN TRUST for such only son of mine or only daughter living at my decease, to be paid or transferred to such son at his age of twenty-one years, or to such daughter at her age of twenty-one years, or marriage under that age with such consent as aforesaid. AND in case such only son shall die before he shall attain the age of twenty-one years, or such only daughter shall die before she shall attain that age or marry with such consent as aforesaid, or in case I shall have no child living at my decease, the same trust monies, stocks, funds, and securities, or such part thereof as shall not be applied or disposed of

Power to advance moiety of sons' expectant shares.

If no younger children,

In trust for an only son;

and if no son, In trust for an only daughter.

Ultimate trust, if no child.

under the power of advancement hereinbefore contained (as the case may be), shall go and be IN TRUST for [*ulterior legatee*]. PROVIDED ALWAYS, and I declare, that in the meantime and until the said trust monies, stocks, funds, and securities shall vest absolutely in and become payable or transferable to some person or persons under the trusts hereinbefore declared concerning the same, the said trustees and trustee do and shall from time to time receive the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities, or of the invested or unapplied part or parts thereof, and lay out and invest the same, or so much and such part thereof as shall not be applied for the maintenance or education of any child or children of mine under the aforesaid power or authority in that behalf, in the names or name of such trustees or trustee, in any of the parliamentary stocks or public funds of Great Britain and Ireland, or at interest upon government or real securities in England, and do and shall receive the interest, dividends, and annual produce of the said last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature (the said trustees varying and transposing the said stocks, funds, and securities from time to time as occasion shall require), and do and shall from time to time repeat such investments, so that all the resulting income and produce for the time being may, during such suspense of vesting as aforesaid, accumulate in the way of compound interest; And I declare, that the said interest, dividends, and annual produce, stocks, funds, and securities, and all the accumulations of the same, shall go and be IN TRUST for the person or persons who, under the trusts hereinbefore declared, shall become absolutely entitled to the funds from which the same respectively shall have proceeded, and be considered part thereof respectively; nevertheless, I declare, that the said accumulated fund shall continue and be subject and liable to be applied for the maintenance and education of the child or children respectively from whose presumptive share or shares the same shall have arisen. AND I APPOINT the said [*trustees*] executors of this my will, and I give to them the sum of £—— each, in consideration of the trouble they will have in the execution of the trusts of this my will. PROVIDED ALWAYS and I

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

Clause directing accumulation of income unapplied to maintenance.

Appointment of executors.

Indemnity to

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

purchasers and mortgagees in respect of application of purchase monies, &c.

hereby declare, that the receipts in writing of the said [*trustees*], or the survivors or survivor of them, or the heirs, executors, or administrators respectively of such survivor, or other the trustees or trustee for the time being of this my will, for any sum or sums of money payable to them or him under or by virtue of any of the powers and authorities hereinbefore contained, or otherwise in the execution of the trusts of this my will, shall be effectual discharges for the same respectively, or for so much thereof respectively as in such receipts shall be expressed or acknowledged to be received, and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss or misapplication thereof. [*Add devise of mortgage and trust estates.*]

Power to appoint new trustees.

PROVIDED ALWAYS, and I hereby declare, that if the said [*trustees*], or any or either of them, or any trustees or trustee to be appointed in their or his place by any codicil or codicils to this my will, shall die in my lifetime, or shall at my decease renounce or be incapable of acting in the trusts of this my will, or in case any trustee for the time being shall at any time or times thereafter die or become unable or unwilling to act in the aforesaid trusts, or shall become bankrupt, or take the benefit of any act of parliament for the relief of insolvent debtors, then, and in every such case, it shall be lawful for the person or persons who for the time being shall, by virtue of any of the limitations of this my will, be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the hereditaments hereinbefore devised, or such of the same persons respectively as shall be of full age and otherwise competent to exercise this present power, but if such person or all such persons (if more than one) shall be under age, or otherwise incompetent to exercise the said power, then for the surviving or continuing trustees or trustee for the time being, or, if there shall be no such trustee, for the executors or administrators of the last surviving or continuing trustee for the time being, or if there be no such person, then for the renouncing or retiring trustees or trustee for the time being, by writing under their, his, or her hands or hand, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying or renouncing, or becoming unable or unwilling to act, or becoming bankrupt or insolvent as afore-

said; and that when and so often as any new trustee or trustees shall be appointed as aforesaid, all the estates, monies, and premises, which for the time being shall be subject to the trusts of this my will, shall be thereupon, with all convenient speed, conveyed, assigned, and transferred, in such manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustees or trustee and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees, then in such new trustee or trustees only, *To the uses*, and upon the trusts hereinbefore declared concerning the same trust estates, monies, and premises respectively, or such of them as shall or may be then subsisting or capable of taking effect; and that all and every such new trustee or trustees shall and may in all things, as well before as after such conveyance, assignment, and transfer as aforesaid, act and assist in the management, carrying on, and execution of the aforesaid trusts, in conjunction with the other then surviving or continuing trustee or trustees, if any, if not, then by himself, herself, or themselves, as fully and effectually, and with all the same powers and authorities and discretion whatsoever, to all intents and purposes whatsoever, as if he, she, or they had been originally in and by this my will nominated trustee or trustees, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. PROVIDED ALSO, and I do hereby declare, that the trustees for the time being of this my will shall be charged and chargeable respectively for such monies only as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his, her, or their, or any of their signing or joining in any receipt or receipts for the sake of conformity; and any one or more of the said trustees shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the others or other of them, or for any banker, broker, or other person with whom or in whose hands any part of the said trust monies shall or may be deposited or lodged for safe custody or otherwise, in the execution of the trusts hereinbefore contained; and that the said trustees shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks, or funds, in or upon which the said trust monies, or any part thereof, shall be placed out or invested, or for any other involuntary loss or damage that may happen in the

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

Indemnity to trustees,

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

execution of the trusts aforesaid, or in relation thereunto; and that it shall be lawful for them the said trustees for the time being, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse themselves respectively, and also to allow to their co-trustee and co-trustees respectively all costs and charges which they or any of them shall or may incur or be put unto in or about the execution of the aforesaid trusts, or in relation thereunto.

and to retain expenses.

Appointment of guardians for his sons.

And I hereby appoint my said wife [*name*], and the said [*trustees*], and the survivors and survivor of them, guardians and guardian of my son [*name*], and any son or sons I may hereafter have, during their respective minorities; and I direct that my said sons shall be under the personal care of my said wife until they shall respectively attain seven years of age; and as and when my said sons shall respectively attain the said age of seven years, or in the event of the death of my said wife before they shall have respectively attained that age, I direct that my said sons shall from thenceforth, during their respective minorities, reside with and be under the care of a private tutor, to be selected by their guardians or guardian for the time being.

Appointment of guardians for his daughters, with substitution of other guardians in case of their death.

And I hereby appoint my said wife [*name*], and [A. B.], wife of [*name and description*], and the said [*one of the trustees*], and the survivors and survivor of them, to be guardians and guardian of my daughter [*name*], and any daughter or daughters I may hereafter have, during their respective minorities and discoverture; and in the case of the death of my said wife and the said [A. B.] during the minority and discoverture of any of my said daughters, then and in such case I appoint [C. D.], the wife of [*name and description*], to be a guardian of my said daughters in the stead and place of my said wife and the said [A. B.]. And I further direct, that my said daughters shall reside with and be under the personal care of my said wife during their respective minorities and discoverture, if my said wife shall so long live; but, in the event of the death of my said wife during the minority and discoverture of any of my said daughters, then and in such case I direct, that such of my said daughters as shall not then have attained their age of twenty-one years or been married, shall reside with and be under the personal care of the said [A. B.] until they shall

respectively attain the age of twenty-one years or marry, provided the said [A. B.] shall so long live and shall be willing to accept such charge; but in case the said [A. B.] shall die during the minority and discoverture of any of my said daughters, or shall decline accepting such charge as aforesaid, then I direct that such of my said daughters as shall not then have attained the age of twenty-one years or be married shall reside with and be under the personal care of the said [C. D.], until they shall respectively attain the age of twenty-one years or marry. And I do particularly direct, that none of my said children be sent to any school, seminary, or academy whatsoever, and that such allowance be made to a private tutor, to whom my said sons shall be committed as aforesaid, for their maintenance and education, as the guardian or guardians for the time being of my said sons shall in his or their discretion think proper, and that a liberal allowance be made after the death of my said wife for each of my daughters, to be paid quarterly to the said [A. B.], or, in case of her decease or declining the care of my daughter or daughters, to the said [C. D.], so long as any of my daughters shall reside with them respectively as aforesaid, for the expense and trouble of their board during their respective minorities and discovertures, exclusively of any expenses which may be incurred in engaging proper masters for the education and instruction of my said daughters, and also of any expenses which may be incurred in case of sickness. And it is my most anxious wish and desire, that all my said children shall be brought up and educated in a liberal and becoming manner, and especially that the utmost care and pains be bestowed to instil into their minds principles of religion and virtue, which it is my firm and increasing conviction constitute the only true and solid foundations of human happiness. In witness, &c.

RENEWABLE LEASEHOLDS. STRICT SETTLEMENT. ACCUMULATION.

Directions as to the education of children.

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

WILL *devising* CERTAIN ESTATES *to* TRUSTEES *for a Term of Years to raise* MONEY *for Payment of Testator's* DEBTS *and* LEGACIES *in aid of the Personal Estate; and subject thereto, to Testator's* ELDER DAUGHTER *and her* ISSUE, *in strict Settlement, with Remainder to his* YOUNGER DAUGHTER *and her* ISSUE, *in* STRICT *Settlement. Other Estates are devised to the* YOUNGER *and* ELDER DAUGHTERS, *and their* ISSUE *successively, in an inverted Order, with Remainder to Testator's* NIECE *and her* ISSUE *in strict Settlement.* POWER *to the* DAUGHTERS *and* NIECE *respectively to appoint* RENT CHARGES *to Husbands.* DIRECTION *to the respective Devisees for Life and in tail to* ASSUME TESTATOR'S NAME *and* ARMS, *and* DEVISE OVER *in* DEFAULT. *Proviso* SHIFTING *one of the* ESTATES, *in case of their both becoming* UNITED *in a* CHILD *of either of the* DAUGHTERS. SPECIAL DIRECTION *to* SELL *certain Property to an Individual, at a* VALUATION. *Power to* TENANTS *for* LIFE *to* FELL TIMBER *for* REPAIRS. APPOINTMENT *of* PROTECTOR, *with Power to supply* VACANCIES. BEQUEST *of* HOUSEHOLD FURNITURE, *to be enjoyed by Devisees as* HEIR LOOMS. RESIDUE *of* PERSONALTY *equally among Testator's Daughters.* (*Clause in Note reducing* ESTATES TAIL *of Persons born in Testator's Lifetime to* ESTATES *for* LIFE).

Revocation of former wills.

I [*testator*], of &c., only son and heir of [*testator's father*], late of ——, deceased, by [*testator's mother*], his late wife, also deceased, do hereby revoke all wills, codicils, and other testamentary dispositions made by me at any time or times heretofore, and do declare this to be my last will and testament.

Devise of tes-

I GIVE AND DEVISE all that my manor or lordship of

——, and all other the manors or lordships, messuages, farms, lands, tenements, and hereditaments whatsoever in the county of York, comprised in my marriage settlement, bearing date on or about the —— day of ——, and all other the manors or lordships, messuages, farms, lands, tenements, and hereditaments in the said county of York, of or to which I or any person or persons In trust for me am, is, or are seised or entitled for any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, or otherwise howsoever, or which I have power to dispose of or appoint by this my will, with their appurtenances, and all my estate and interest therein (subject as to such of the said manors and other hereditaments as are comprised in a certain term of —— years, created by my said marriage settlement, and thereby limited to [*trustee*], of ——, his executors, administrators, and assigns, to the payment of the sum of £—— thereby secured or provided for my sister [*name*], as her portion), to the uses following (that is to say), *To the use* of [*trustees*], of &c., their executors, administrators, and assigns, for the term of —— years, to commence and be computed from the day of my decease, and thenceforth next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste, upon and for the trusts, intents, and purposes, and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same; and after the expiration or sooner determination of the said term of —— years, and in the meantime subject thereto and to the trusts thereof, *To the use* of my elder daughter [*name*], and her assigns, during the term of her natural life; and after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*elder daughter*], *To the use* of [*trustees*], of &c., their heirs and assigns, during the natural life of the said [*elder daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited, but, nevertheless, to permit the said [*elder daughter*], and her assigns, during her life, to receive the rents and profits of the said manors and other hereditaments for her and their proper use and benefit; and immediately after the decease of the said [*elder daughter*], *To the use* of the first and every other son of the said [*elder daughter*], severally

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

tator's estates in the county of York,

To the use of trustees for a term of —— years, and subject thereto,

To testator's elder daughter for life; remainder,

To trustees, to preserve; remainder,

To sons of elder daughter suc-

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

cessively, in tail male; remainder,

To sons in tail general; remainder,

To daughters in tail male; remainder,

To daughters in tail general; remainder,

To younger daughter of testator for life; remainder,

To trustees, to preserve; remainder,

To sons of younger daughter in tail male; remainder,

To her sons in tail general; remainder,

To her daughters in tail male; remainder,

To her daughters in tail general.

Trusts of the term of —— years to raise money to pay debts and legacies.

and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities in tail general; and in default of such issue, *To the use* of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of my younger daughter [*name*], and her assigns, for and during the term of her natural life; and after the determination of that estate, by forfeiture or otherwise, in the lifetime of the said [*younger daughter*], *To the use* of the said [*trustees*], their heirs and assigns, during the natural life of the said [*younger daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*younger daughter*], and her assigns, during her life, to receive the rents and profits of the said manors and other hereditaments for her and their proper use and benefit; and immediately after the decease of the said [*younger daughter*], *To the use* of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of my own right heirs for ever. AND as to the term of —— years hereinbefore limited to the said [*trustees of term*], their executors, administrators, and assigns, I declare that the same term is so limited to them, UPON TRUST, that they the said [*trustees of term*], or the survivor of them, or the executors or administrators of such

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

survivor, shall and do, as soon as conveniently may be after my decease, by demising, assigning, mortgaging (*a*), selling, or otherwise disposing of the said manors and other hereditaments comprised in the said term of —— years, or any of them, or any part thereof, for the whole or any part of the same term, or by, with, and out of the rents and profits of the said manors and other hereditaments, or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments or any of them for the rents then in arrear, or by more than one or by all of the aforesaid ways and means, or by any other reasonable ways or means, levy and raise any sum or sums of money which they the said [*trustees of term*], or the survivor of them, or the executors or administrators of such survivor shall, in their or his discretion, think fit or expedient to levy and raise for the payment of my debts, legacies, and funeral and testamentary expenses; and do and shall pay and apply the monies to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment or satisfaction and discharge of my said debts, legacies, and funeral and testamentary expenses; And I hereby declare, that it shall be lawful for the said [*trustees of term*], or the survivor of them, and the executors or administrators of such survivor, to sign and give a receipt or receipts in writing for the sum or sums of money so to be raised by them or him as aforesaid, and that the person or persons paying or advancing the same respectively, and taking such receipt or receipts, shall not be answerable or accountable for the loss, misapplication, or non-application, or be in anywise bound or concerned to see to the application thereof, or to inquire whether my personal estate, or any part thereof, hath been previously applied, or to ascertain that the money proposed to be levied and raised is actually wanted for the purposes aforesaid, the same being absolutely left to the discretion of my said trustees or trustee for the time being, and no other person or persons is or are to be concerned or implicated therein. PROVIDED ALWAYS, and I hereby declare, that although I have hereby given my said trustees a discretionary power to resort to my said real

Purchasers not to be liable to see to the application of purchase money, or obliged to inquire into the necessity of any sale.

Personal estate to remain the primary fund for payment of debts and legacies.

(*a*) Compare this with the power of mortgaging, *ante*, 382, which is more extensive, as it authorizes the insertion of a power of sale.

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

estates for raising money for payment of my said debts, legacies, and funeral and testamentary expenses, before my said personal estate shall have been applied or exhausted in or towards the payment thereof, yet such power is vested in them merely in order to facilitate the raising of money for the purposes aforesaid, and to prevent the difficulties and delay which might otherwise occur; and it is my intention, that my personal estate shall be considered as the primary, and the said term of —— years the secondary fund for the payment of my debts, legacies, funeral and testamentary expenses; and, therefore, that if the said real estate be first resorted to, the personal estate shall, so far as the same will extend, make good the money to be raised out of my said real estate, and for that purpose, as the case may require, either be applied in exoneration of the said real estates, or be laid out in the purchase of lands to be settled to the uses hereinbefore limited by me of and concerning the hereditaments hereinbefore by me devised. PROVIDED ALWAYS, and I declare, that from and immediately after the trusts hereinbefore declared of and concerning the said term of —— years shall in all respects be fully performed and satisfied, or shall become unnecessary or incapable of taking effect, and the said [*trustees of term*], their executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, charges, and expenses, if any, to be occasioned by or relating to the trusts hereby reposed in them as aforesaid (and which they are hereby authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly), the same term shall, as to all the said manors and other hereditaments comprised therein, or as to such of the same manors and other hereditaments as shall not have been sold or mortgaged for the purposes aforesaid (as the case may be), absolutely cease and determine; and as to such of the same premises as shall have been mortgaged for the purposes aforesaid shall, subject to such mortgage or mortgages, wait upon and attend the freehold and inheritance of the hereditaments so mortgaged. AND I GIVE AND DEVISE all those the manors or lordships of —— and ——, in the county of Lincoln, and all other the manors, messuages, farms, lands, tenements, and hereditaments whatsoever in the said county of Lincoln, of or to which I, or any person or persons in trust for me, am, is, or are seised or entitled for any estate

Proviso as to cesser of the term.

Devise of estates in the county of Lincoln.

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

of freehold or inheritance in possession, reversion, remainder, expectancy, or otherwise howsoever, or which I have power to dispose of or appoint by this my will, with their appurtenances, and all my estate and interest therein, to the uses following (that is to say), *To the use* of the said [*younger daughter*], and her assigns, for and during the term of her natural life; and after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*younger daughter*], *To the use* of the said [*trustees*], their heirs and assigns, during the natural life of the said [*younger daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*younger daughter*], and her assigns, during her natural life, to receive the rents and profits of the same manors and other hereditaments, for her and their proper use and benefit; and immediately after the decease of the said [*younger daughter*], *To the use* of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the first and every daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the said [*elder daughter*], and her assigns, for and during the term of her natural life; and after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*elder daughter*], *To the use* of the said [*trustees*], their heirs and assigns, during the natural life of the said [*elder daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*elder daughter*], and her assigns, during her life, to receive the rents and profits of the same manors and other hereditaments for her and their proper use and benefit; and immediately after the decease of the said [*elder daughter*], *To the use* of the first and every other son of the

To testator's younger daughter for life; remainder,

To trustees, to preserve; remainder,

To sons of younger daughter in tail male; remainder,

To her sons in tail general; remainder,

To her daughters in tail male; remainder,

To her daughters in tail general; remainder,

To testator's elder daughter for life; remainder,

To trustees, to preserve,

To her sons in

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of my niece [*name*], of &c., and her assigns, during the term of her natural life; and after the determination of that estate, by forfeiture or otherwise, in the lifetime of the said [*niece*], *To the use* of the said [*trustees*], their heirs and assigns, during the natural life of the said [*niece*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*niece*], and her assigns, during her natural life, to receive the rents and profits of the same manors and other hereditaments for her and their proper use and benefit; and immediately after the decease of the said [*niece*], *To the use* of the first and every other son of the said [*niece*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other son of the said [*niece*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the first and every other daughter of the said [*niece*], severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the first and every other daughter of the said [*niece*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of my own right heirs for ever. PROVIDED ALWAYS, and I hereby declare, that it shall be lawful for each and every or any of my said daughters and niece respectively, previously to and in contemplation of marriage or after marriage, whether actually entitled in possession under the limitations hereinbefore contained or not (but subject and without prejudice to the estates and limitations, if

tail male; remainder,

To her sons in tail general; remainder,

To her daughters in tail male; remainder,

To her daughters in tail general; remainder,

To testator's niece for life; remainder,

To trustees, to preserve; remainder,

To her sons in tail male; remainder,

To her sons in tail general; remainder,

To her daughters in tail male; remainder,

To her daughters in tail general; remainder,

To testator's own right heirs.

Power to daughters and niece to appoint rent charges to husbands for life.

any, prior to the estate for life of the person exercising this present power), by any deed or deeds, writing or writings, with or without power of revocation, to be executed by such daughter or niece respectively, in the presence of and attested by one witness or more, or by her last will and testament, or any writing in the nature thereof, to be signed and published in the presence of and attested by three or more witnesses, to limit and appoint, to or in favour of any husband who shall happen to survive her, one or more annual sum or sums of money, not exceeding in the whole the sum of £——, to be yearly issuing and payable out of the manors and hereditaments devised and appointed to such daughter or niece of mine respectively for life as aforesaid, for and during the life of such husband, and to be paid in such manner as my said daughter or niece respectively shall direct; and for the purpose of securing the annual sum or sums so to be appointed as aforesaid, to limit and appoint to such surviving husband the usual powers and remedies for enforcing the payment thereof respectively, by distress and entry upon and perception of the rents and profits of the hereditaments to be charged with the said annual sum or sums, and also to limit and appoint the hereditaments so to be charged as aforesaid to any person or persons whomsoever, for any term or terms of years, for securing such rent charge or rent charges as aforesaid, so that the same term or terms of years be made to determine on the death of the husband for the benefit of whom the same shall be created, and on the payment of the arrears of his rent charge or rent charges, and the expenses incurred by the nonpayment thereof respectively (*b*). PROVIDED ALWAYS, and I hereby request and

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &C.

Direction to de-

(*b*) When a power of charging annual sums of this nature is given to several persons consecutively, it is usual to limit the aggregate amount of the charges to a given sum, which may be effected by such a clause as the following:

"PROVIDED NEVERTHELESS, and I hereby declare, that the hereditaments respectively hereinbefore devised and appointed shall not, nor shall any part thereof, by virtue of the power lastly hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums exceeding in the whole the sum of £——; and if by means thereof the

Clause limiting the aggregate amount of rent charges affecting the lands at one time.

STRICT SETTLEMENT, SHIFTING LIMITATIONS, &c.

injoin every person (not being a female under coverture) who for the time being shall be entitled, by virtue of the li-

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visees to assume testator's name and arms.

same shall or would, in case this present proviso were not inserted, be charged with a greater annual sum in the whole than £——, the payment of the annual sum occasioning such excess, or such part thereof as occasions the same, shall, during the time of such excess, be suspended."

If the testator means that the estates tail of grandchildren coming into existence in his lifetime should be reduced to estates for life, the object may be effected by adding such a clause as the following to the precedent in the text:

Clause reducing estates tail of persons born in testator's lifetime to estates for life.

"PROVIDED ALWAYS, and I hereby declare, that if it shall happen that any person to whom an estate tail is hereinbefore devised or appointed shall be born in my lifetime, or in due time after my decease, then, and in every such case, and so often as the same shall happen, I revoke the devise and appointment respectively hereby made to such person, and in lieu thereof I give, devise, and appoint the hereditaments comprised in the devise and appointment respectively so revoked to the use of the person so hereby made tenant in tail for and during the term of his or her natural life; and from and after the determination of that estate, by forfeiture or otherwise, in his or her lifetime, *To the use* of the said [*trustees*], their heirs and assigns, for and during the natural life of the person so as aforesaid made tenant for life, UPON TRUST, by the usual ways and means, to preserve the contingent remainders, and to permit and suffer such tenant for life to receive the rents and profits of the said hereditaments for his or her proper use and benefit; and immediately after the decease of each such tenant for life, *To the use* of the first and every other son of such tenant for life, severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of the same first and every other son, severally and successively, according to their respective seniorities, in tail general; and in default of such issue, *To the use* of the first and every other daughter of the said last-mentioned tenant for life, severally and successively, according to their respective seniorities, in tail male; and in default of such issue, *To the use* of his or her first and every other daughter, severally and successively, according to their re-

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mitations hereinbefore contained, to an estate for life or an estate tail in possession, in any of the manors and other hereditaments devised or appointed by this my will, and not previously having the surname and arms hereinafter required to be used, and also the husband of any female who shall so become entitled, forthwith to apply for and obtain an act of parliament, or his Majesty's licence, authorizing him or her to use the surname of —— [*testator's surname*] (*c*), either alone or in addition to his or her own surname, (but so ne-

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Power to such person to limit rent charges to husband or wife.

spective seniorities, in tail general. And I direct and declare, that any and every such tenant for life, if a female, shall have the same or the like power of limiting and appointing one or more yearly rent charge or rent charges unto or in favour of any husband surviving her, and with such remedies and means (including the creation of a term or terms of years) for the recovery thereof as is and are hereinbefore reserved to my daughters and niece respectively; And I further direct and declare, that any and every such tenant for life, if a male, shall be and he is hereby empowered, either before or after marriage, and whether he shall eventually become entitled to the actual possession or not, (but without prejudice to prior estates and limitations, if any,) to grant, limit, and appoint to or in favour of any wife or wives surviving him, one or more yearly rent charge or rent charges by way of jointure, equal in amount, and in all other respects similar to and correspondent with the rent charge or rent charges which my said daughter and niece respectively are authorized to grant, limit, and appoint to or in favour of any surviving husband as aforesaid, with such remedies and means, by distress and entry, and the limitation of a term or terms of years, for enforcing the payment of the same rent charge or rent charges, as are authorized to be created or given by the exercise of the power of appointment hereinbefore reserved to my said daughters and niece respectively in favour of any surviving husband or husbands, subject nevertheless, in respect of all the annual charges to be created by any of the means aforesaid, to the limitation and restriction in the aggregate amount thereof hereinbefore expressed."

(*c*) As to conditions imposing the assumption of a name, *vide* 1 Jarm. Pow. Devis., p. 298.

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vertheless that the name of —— shall be the last or principal name), and also to wear my family arms quartered with his or her own family arms, and thenceforth, from time to time, to assume, use, and wear such surname and arms accordingly; and in case such tenant for life or tenant in tail, or the husband of such tenant for life or tenant in tail (as the case may be) shall neglect or fail to comply with this request or injunction for the space of —— calendar months after he or she, or his wife (as the case may be) shall so become entitled in possession as aforesaid, or if he or she shall or may be then under the age of twenty-one years, or shall be otherwise personally incompetent to comply therewith, then within —— calendar months after the removal of such incompetency, and also in case any such tenant for life or tenant in tail, or her husband (as the case may be) shall, by reason of his o her previously having the surname and arms aforesaid, be exempt from the necessity of complying with this present proviso, shall, at any time thereafter, discontinue to use the same, then and in either of the cases aforesaid, and immediately thereupon, the estate for life or estate tail or respective estates tail of every such person, or his wife or ancestor (as the case may be), in the hereditaments hereby devised and appointed, shall absolutely cease and determine, and the remainder or remainders expectant thereon shall be accelerated; yet so nevertheless that if the person, who, or whose husband, shall be guilty of such neglect and failure as aforesaid, shall be a tenant for life under the limitations hereinbefore contained, and the remainder immediately expectant on the estate of such person respectively shall be contingent, the hereditaments in respect of which such event shall have happened shall remain and be to the use of the said [*trustees*], their heirs and assigns, during the life of such tenant for life, UPON TRUST to preserve such contingent remainder or remainders, and from time to time, until the vesting thereof, to permit the rents and profits thereof to be received and enjoyed by the person or persons for the time being next entitled in remainder, under or by virtue of such of the ulterior limitations affecting the said hereditaments as shall have actually become vested and taken effect. And I hereby declare, that, in the event of the cesser or determination of the estates or estate for

In case of neglect or failure, the estate of such person to cease.

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life of my said daughters or niece, or either of them, by virtue of this present proviso, by reason of the neglect or failure of her or their husband or respective husbands to comply with the request and injunction aforesaid, any appointment or appointments which such daughter or daughters or niece respectively may have made in favour of her or their said husband or husbands respectively, by virtue of the power in that behalf hereinbefore contained, shall be absolutely null and void, any thing hereinbefore contained to the contrary notwithstanding. PROVIDED ALSO, and I further declare, that if, by reason of the failure of issue of the said [*elder daughter*], entitled or inheritable under the limitations hereinbefore contained, any child of the said [*younger daughter*], or any issue of any such child, shall, for the time being, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of York be tenant in tail male or in tail general in possession of the same manors and other hereditaments, and shall, at the same time, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of Lincoln, be tenant in tail male or in tail general in possession of the said last-mentioned manors and other hereditaments, and there shall then be living any other child of the said [*younger daughter*], or any issue of any such other child, then, and so often as the same shall happen, the estate in tail male or in tail general in possession, which the person so in possession under the limitations hereinbefore contained shall be seised of or entitled to of or in the said manors and other hereditaments in the said county of Lincoln, and also any estate in tail general to which, under the limitations aforesaid, any such person may happen to be entitled of or in the same manors and other hereditaments in remainder immediately expectant on his or her estate in tail male in possession therein, shall cease and determine. But I declare, that if, by virtue of this proviso, my said estates in the said county of Lincoln shall have shifted from any child of the said [*younger daughter*], or any issue of any such child, and there shall afterwards be a failure of issue of the other child, or of all the other children (if more than one) of the said [*younger daughter*], then, and in that case, my said estates in the said county of Lincoln shall return, be, and

Proviso shifting Lincolnshire estate, in case of its becoming united with the Yorkshire estate in a child of the younger daughter.

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remain to such child, from whom or from whose issue the same shall have so shifted, in tail male, with remainder to such child in tail general, with such remainders over as are hereinbefore limited, expressed, or contained of or concerning the same. PROVIDED ALSO, and I further declare, that if there shall be a failure of issue of the said [*younger daughter*], entitled or inheritable under the limitations hereinbefore contained, and if any child of the said [*elder daughter*], or any issue of any such child, shall, for the time being, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of Lincoln, be tenant in tail male or in tail general in possession of the same manors and other hereditaments, and shall at the same time, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of York, be tenant in tail male or in tail general in possession of the said last-mentioned manors and other hereditaments, and there shall then be living any other child of the said [*elder daughter*], or any issue of any such other child, then, and so often as the same shall happen, the estate in tail male or in tail general in possession, which the person so in possession under the limitations hereinbefore contained shall be seised of or entitled to, of or in the said manors and other hereditaments in the said county of York, and also any estate in tail general to which, under the limitations aforesaid, any such person may happen to be entitled, of or in the same manors and other hereditaments in remainder immediately expectant on his or her estate in tail male in possession therein, shall cease and determine. But I declare, that if, by virtue of this proviso, my said estates in the said county of York shall have shifted from any child of the said [*elder daughter*], or any issue of any such child, and there shall afterwards be a failure of issue of the other child, or of all the other children (if more than one) of the said [*elder daughter*], then, and in that case, my said estates in the said county of York shall return, be, and remain to such child, from whom or from whose issue the same shall have so shifted as last aforesaid, in tail male, with remainder to such child in tail general, with such remainders over as are hereinbefore limited, expressed, or contained of or concerning the same. *(Here insert powers of leasing, sale, and ex-*

Clause shifting the Yorkshire estate, in the event of its becoming united with the Lincolnshire estate in a child of the elder daughter.

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Power conferring on a person an option to purchase part of the settled estates, the price to be settled by arbitration.

change, enfranchising copyholds, and of authorizing copyholders to demise, as in last precedent.) PROVIDED ALWAYS, and I hereby declare, that the said [*donees of power*], or the survivor of them, or the executors or administrators of such survivor, do and shall, as soon as conveniently may be after my decease, give notice in writing to my friend [A. B.], of &c., that I have given to him (as I hereby do) the option of purchasing my messuage or tenement called ——, and the said lands, tenements, and hereditaments thereunto belonging hereinbefore devised or intended so to be; and if the said [A. B.] shall be willing to make such purchase, and shall contract and agree for the same with the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, within the space of twelve calendar months next after such notice shall be so given (which contract or agreement the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, are and is hereby authorized and required to enter into with him accordingly), then, and in such case, as soon as conveniently may be after such contract or agreement shall be so entered into (unless the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, shall have agreed with the said [A. B.] as to the amount of the purchase money to be paid for the said premises), a valuation shall be made of the said messuage or tenement called ——, and the said lands, tenements, and hereditaments thereunto belonging hereinbefore devised, or expressed and intended so to be, by two competent persons, one of them to be chosen by the said [A. B.], and the other of them by the said [*donees*], or the survivor of them, or the executors or administrators of such survivor; and if such two persons shall disagree in the premises, then by a third person or umpire, to be nominated by the two persons so first chosen, whose decision shall be final; and then and in such case it shall be lawful for the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, and they and he are and is hereby directed and required, upon payment to them or him by the said [A. B.], his heirs or assigns, of the sum of money agreed to be paid for the purchase of the said messuage or tenement and other hereditaments, or at which the same shall be so valued (as the case may be), by any deed or deeds, instru-

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ment or instruments in writing, to be sealed and delivered by them or him in the presence of, and to be attested by two or more credible witnesses, to revoke and make void all and every the uses, trusts, estates, powers, provisoes, and declarations hereinbefore limited or expressed concerning the said messuage or tenement called ——, and the said lands, tenements, and hereditaments thereunto belonging hereinbefore devised or intended so to be (subject nevertheless, and without prejudice to any lease or leases which may have been granted thereof, or of any part thereof, under the power hereinbefore in that behalf contained,) and to limit and appoint the same premises, with the appurtenances (subject and without prejudice as aforesaid), *To the use* of the said [A. B.], his heirs and assigns for ever, or to such other uses as he or they shall direct or appoint. And I declare, that the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, shall stand and be possessed of and interested in the money so to be paid to them or him by the said [A. B.], his heirs or assigns, for the purchase of the said last-mentioned messuage or tenement and other hereditaments as aforesaid, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, and declarations as are hereinbefore expressed and declared of or concerning the money which may arise from the sale of any of the hereditaments hereinbefore devised and appointed, or expressed and intended so to be, which may be sold under or by virtue of the general power of sale hereinbefore contained. And I declare, that the receipt or receipts in writing of the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, for the purchase money for the said messuage or tenement called ——, and the lands, tenements, and hereditaments thereunto belonging, shall effectually discharge the said [A. B.], his heirs, executors, administrators, and assigns respectively from being answerable or accountable for the loss, misapplication, or nonapplication, or being in anywise bound or concerned to see to the application of the money therein expressed and acknowledged to be received. PROVIDED ALSO, and I hereby declare, that it shall be lawful for every person who, under the limitations hereinbefore contained, shall for the time being be in the actual possession

Declaration of trusts of purchase money.

Power for tenants for life to fell timber for repairs.

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of or entitled to the rents and profits of any of my said manors and other hereditaments, and shall not be seised of or entitled to an estate in tail male or in tail general of and in the same, at all seasonable times in the year, to fell, cut down, take, carry away, and remove from all or any part of the said lands and hereditaments of which such person respectively shall be so in possession, or to the rents and profits of which he or she shall be so entitled as aforesaid, sufficient timber and wood for the erecting or making any necessary buildings, gates, stiles, or fences upon all or any part of the same lands and hereditaments respectively, or for the repair of any of the houses, outhouses, edifices, or buildings, or any gates, stiles, or fences now standing or being upon all or any of the same lands or hereditaments, so as to keep the same in good and tenantable repair, but not for any other purpose whatsoever; it being my intention that no timber whatsoever shall in any case be sold or disposed of or cut from off the same premises other than for the purposes aforesaid. AND WHEREAS, it is my anxious desire, that the several entails created by this my will be prevented from being barred or destroyed so long as the rules of law will permit; NOW, THEREFORE, in pursuance and by virtue of the power and authority given and conferred by an act of Parliament passed in the third and fourth years of the reign of his present Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," I hereby nominate and appoint my friends [*three persons*], of &c., to be protectors of the several estates tail created by this my will during the continuance of the estate or respective estates for life, for the time being prior or antecedent to such estate tail or estates tail respectively, with such discretionary powers, authorities, and privileges as the said act of Parliament hath annexed to the office of protector thereby created. [And I direct and declare that the person or persons who would, if no protector were appointed by this my will, be the protector or protectors of the said entail or entails, shall be absolutely and wholly excluded from the protectorship, notwithstanding that by death or the happening of any other event or contingency occasioning a vacancy in the said office, the protectorship hereby constituted shall be temporarily sus-

Appointment of protectors of estates tail.

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peded (*d*).] PROVIDED ALWAYS, and I further declare, that in case any or either of them the said [*protectors*] or any protector or protectors to be appointed as hereinafter mentioned, shall die or be desirous to relinquish the office of protector, then and in every such case it shall be lawful for the surviving or continuing protectors or protector for the time being, or if there shall be no surviving or continuing protector, then for the executors or administrators of the last deceased protector, or if there shall be no such person, then for the protector or protectors so relinquishing the office as aforesaid, by any deed or deeds to be duly enrolled in the High Court of Chancery, to nominate and appoint one or more person or persons, not being tenant for life in possession for the time being of the hereditaments hereinbefore devised and appointed, to be a protector or protectors in the room of the person or persons who shall so have died or have relinquished the protectorship as aforesaid, to the intent that the full number of three persons shall and may from time to time fill the said office; and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise, either in conjunction with the surviving or continuing protector or protectors, or solely, as the case may be, the same discretionary powers, authorities, and privileges in all respects as he or they would have had and might have exercised, if he or they had been appointed a protector or protectors of the said estate tail or respective estates tail by this my will (*e*). And it is my especial request and entreaty

Power of supplying vacancies in protectorship.

(*d*) This clause is unnecessary, if, as seems probable, the case against which it provides falls within the last clause of the 33rd section of the stat. 3 & 4 Will. 4, c. 76, *ante*, Vol. 9, p. 380, vesting the protectorship in the Court of Chancery.

Points to be attended to in framing appointment of and power of nominating protector.

(*e*) In framing the appointment of protectors and the power of supplying vacancies, the following points are to be remembered:—

1st. That the protectors appointed by the testator must not exceed three in number, must be *in esse* at his death, and not *aliens*.

2nd. That the power of new appointment authorized by the act only extends to vacancies occurring by death or relinquishment. Other occasions of vacancy are provided against by the legislature itself.

3rd. That if the owner of the prior estate for life or estate determinable with life is made one of the protectors, he should be prohibited from

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that the protectors for the time being will exercise the controlling power vested in them by the aforesaid act of Parliament, in declining and refusing, during the whole continuance of the protectorship hereby created, to aid any tenant in tail under this my will in acquiring the fee simple in the hereditaments hereby limited to him or her, unless for the purpose of resettling and assuring the said hereditaments in such manner as will tend to fix and perpetuate the same in my descendants. AND I GIVE AND BEQUEATH all the plate, pictures, engravings, drawings, busts, china, glass, books, linen, and other household goods and furniture whatsoever, which shall be in any house or houses, which at the time of my decease shall be occupied by me or by my bailiff, servant, or other person for my use, to the said [*trustees*], their executors, administrators, and assigns, UPON TRUST to permit the same from time to time to go and be held and enjoyed with the said house or houses respectively, so far as the rules of law and equity will admit, by the person or persons who for the time being shall be entitled to the possession of the same house or houses respectively, by virtue of this my will; yet so that the said furniture and other effects shall not vest absolutely in or become the property of the child of any person hereby made tenant for life of the said house respectively, unless such child shall attain the age of twenty-one years. But nevertheless, such child respectively shall, during his or

Injunction to protectors to preserve entails.

Bequest of household furniture as heirlooms.

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acting as protector in case of the office becoming, by the death or retirement of his co-adjutors, vested solely in him, as otherwise it should seem he might do. The effect of such a declaration is, to constitute the Court of Chancery protector until the vacancy in the protectorship is supplied under the power. (*Vide ante*, Vol. 9, p. 380).

With respect to the injunction which the testator in the precedent in the text has thought proper to lay upon his protectors, it should be remarked that it creates no *legal* obligation; the act having anxiously and explicitly declared the protector's discretion to be absolute and uncontrollable. It is probable, however, that the new scheme will tend to prolong the continuance of entails, as a disinterested protector, who is specially appointed for the preservation of an entail, is far more likely to abstain from concurring in its destruction, than a tenant for life, who often derives a benefit from and is indeed the chief mover in the transaction. See further as to the protector and his office, *ante*, Vol. 9, pp. 376, 405, 408, 463.

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her minority, be entitled to the use and benefit of the said furniture and effects. And I direct that as soon as conveniently may be after my decease, the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, do and shall cause schedules and inventories to be taken of the said furniture and other articles, and two copies to be made thereof, and do and shall sign each of the said copies and keep one of them, and leave the other at the house at which the said furniture and effects shall belong; and do and shall from time to time cause the same to be signed by the person for the time being entitled in possession to the said house or houses respectively under this my will. And I direct that the said [*trustees*] and the survivor of them, and the executors and administrators of such survivor, may and shall from time to time inspect and examine into the state of the said furniture and other effects, and cause such reparations and restorations and replacings to be made thereof from time to time as they or he shall think proper; such reparations and restorations and replacings to be made at the expense of the person or persons for the time being entitled to hold, use, and enjoy the furniture and other articles under the trusts of this my will. And I give and bequeath all the residue and remainder of the personal estate and effects whatsoever and wheresoever of which I shall be possessed at the time of my decease, or which I have a power to dispose or appoint by this my will, unto my said daughters [*elder daughter*] and [*younger daughter*] in equal shares and proportions for their own respective absolute use and benefit. And I appoint my said daughters [*names*], executrixes in trust of this my will. *(Add devise of mortgage and trust estates, and the usual powers to trustees to give discharges for the trust monies, and power of appointing new trustees, and indemnity to trustees.)* In witness, &c.

Direction to trustees to take an inventory.

And from time to time examine the effects.

Bequest of residue of personal estates.

REAL AND PERSONAL ESTATE IN FAVOUR OF WIFE AND CHILDREN.

WILL *of a Gentleman of Fortune bequeathing, besides Pecuniary* LEGACIES, HOUSEHOLD FURNITURE, &c. *at Testator's House in Town absolutely; and* BEQUEATHING *such* HOUSE *to* TRUSTEES, *upon Trust to permit his Wife to* RESIDE *therein during her Life, and at her Death or on her ceasing to reside, upon Trust for* SALE. DEVISE *of* REAL ESTATE *to Testator's Sons* SUCCESSIVELY, *and* THEIR ISSUE *in Strict* SETTLEMENT, *with Remainder to* TRUSTEES *in* TRUST *for* SALE; *Proceeds to be distributed among Testator's Daughters.* BEQUEST *of* HOUSEHOLD FURNITURE, &c. *in Testator's* COUNTRY HOUSE, *upon Trust to be* ENJOYED *by the* DEVISEES *thereof as* HEIR LOOMS. PECUNIARY LEGACY *in Trust for* MARRIED DAUGHTER *for* LIFE; *and at her Decease for her* CHILDREN, *subject to a* POWER *of Selection. Pecuniary* LEGACIES *to Testator's other* CHILDREN *absolutely, with a* SUBSTITUTION *of the* ISSUE *of any dying in Testator's* LIFETIME, *and* CLAUSE *of* ACCRUER *in respect of the* SHARES *of any Child dying without* ISSUE. BEQUEST *of* RESIDUE *of* PERSONALTY, *in Trust for Testator's* WIFE *for* LIFE; *and at her Decease, among the* CHILDREN *and their* ISSUE *as* WIFE *shall* APPOINT; *and in Default of Appointment, in* TRUST *for Testator's* CHILDREN *and* ISSUE *living at* WIFE'S DECEASE *per Stirpes; and in Default of such Objects, in Trust for* WIFE *absolutely.* ADVANCEMENTS *made by Testator to his* CHILDREN *to be deemed a* SATISFACTION *pro tanto of their Legacies. Usual Power to* TRUSTEES *to* VARY SECURITIES, *and especially to* CONTINUE LOAN *to Testator's Son in Law, and* POSTPONE CONVERSION *of* FOREIGN GOVERNMENT SECURITIES. POWER *to* APPOINT

REAL AND PERSONAL ESTATE IN FAVOUR OF WIFE AND CHILDREN.

NEW TRUSTEES. INDEMNITY CLAUSES *to Trustees, including* SPECIAL *Exoneration from the Necessity of seeing to* APPLICATION *of Monies by* CO-TRUSTEES. *(Power in note to* TRUSTEES *to* SETTLE MOIETY *of the* LEGACIES *of* DAUGHTERS MARRYING *during* MINORITY.*)*

I, [*testator*], of &c., [*town residence*], and also of [*country residence*] Esquire, being in perfect health, but deeply impressed with the uncertainty of life by the recent sudden decease of my much lamented friend [*name*], do make this my last will and testament in the following form and manner.

Direction that testator's debts should be paid out of his personal estate.

First, I direct that all the debts which I may owe at the time of my decease, shall be paid out of my personal estate.

Legacies to the executors and trustees.

AND I GIVE AND BEQUEATH to my friends [*trustees*], and my eldest son [*name*], trustees and executors hereinafter appointed, the sum of £—— each, as a small acknowledgment for the trouble they may respectively have in the execution of this my will.

Pecuniary legacy to wife for immediate expenditure.

AND I GIVE AND BEQUEATH to my dear wife the sum of £——, to be paid to her as soon as conveniently may be after my death, for her immediate use and expenditure.

Bequest of effects in and about testator's town residence.

I ALSO GIVE AND BEQUEATH to my said wife all my household furniture, plate, linen, china, glass, books, pictures, paintings, and other property and effects of every description (except money and securities for money, muniments of title, books of account, and manuscripts) (*a*), which shall be in or

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As to bequests of household furniture, &c.

(*a*) It is of no inconsiderable importance to choose the most appropriate words for describing those articles of personalty, which are often bequeathed separately from the general estate, such as household furniture, &c., since many questions arise on such bequests; though as they relate to matters of small value, comparatively few of them become subjects of judicial consideration. To this probably we must ascribe the fact that less attention has been paid to the framing of such gifts than to many other clauses of rarer occurrence.

Bequests of this kind are divisible into two classes, viz. those in which the articles in question are described with reference to locality, and those in which they are not so described. In the former class of cases, the utmost generality of description will commonly best answer the intention; for, where a testator bequeaths all his effects which shall be in and about his dwelling-house at the time of his decease, he usually means that every thing found there at the prescribed period shall pass to the legatee.

about my town house of residence in —— Square at the time of my decease, and also all my watches, jewelry, and trink-

REAL AND PERSONAL ESTATE IN FAVOUR OF WIFE AND CHILDREN.

And even where part is intended to be excepted, if such exception embraces only a single class or a few classes of articles, it is better to describe the subject of the bequest by some general word, such as "effects," or "property," and introduce an exception descriptive of such articles, than to attempt an enumeration of the various classes of articles which the bequest is meant to comprise.

Whether money and securities for money will pass as goods and chattels in a house.

A testator seldom intends, under the bequests in question, to include money and securities for money, which therefore should be expressly excluded, especially the former; as it should seem, according to the cases, that money (including in this denomination bank and other notes payable to bearer on demand) *will*, and securities for money will *not*, pass under a bequest of goods and chattels in and about a particular house*, the latter being merely the evidence of title to things out of the house and not things in it. *Chapman* v. *Hart*, 1 Ves. sen. 271; *Popham* v. *Lord Aylesbury*, Amb. 68. See also 11 Ves. 662; *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Moore* v. *Moore*, 1 B. C. C. 127; *Jones* v. *Sefton*, 4 Ves. 166.

And though debts secured by bond or other instrument under seal are considered as locally situate in the diocese where the securities are found, for the purpose of fixing the jurisdiction of the ecclesiastical court; yet, in regard to the point under consideration, they are undistinguishable from other choses en action, and therefore will not pass as goods and chattels in a house or other designated place. *Moore* v. *Moore*, 1 B. C. C. 127.

In applying the rule, that money will pass under a bequest of goods and chattels, we must not lose sight of the doctrine which teaches that such general words may be restrained by more limited terms with which they are associated; and the circumstance that the legatee has a money legacy has been considered to favor the restrictive construction. *Roberts* v. *Kuffin*, 2 Atk. 112.

Another point often raised in construing bequests of chattels in and about a house, relates to the period at which they must answer to the de-

* A position on this point, in a recent publication in which the editor had a share, requires correction, *vide* Hayes's & Jarman's Concise Wills, p. 13, n., which may be effected by the following substitution. Instead of—"these words, it seems, in general will not pass cash, bank notes, or other choses in action being in the house," read as follows:—"A gift of 'goods,' 'chattels,' or 'effects' in or about a house, it seems, in general will pass cash (including notes payable to bearer on demand, which are considered as cash), but not securities for money." This addition to the errata appears in some, but not all, the copies circulated.

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ets (whether in the said house or elsewhere,) of which I shall be then possessed, for the absolute use and benefit of my said

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At what period effects must answer to a described locality.

scribed locality. The rule seems to be, to consider the death of the testator as such period, unless the contrary appears. And therefore, where a testator devised his house in Jermyn Street, and all his goods and furniture therein, to his lady, for life, except the pictures, which he gave to J. and E.—Lord Keeper *Wright* held, that the exception (which was considered to comprise as well pictures in boxes as those hung up as furniture) extended to pictures brought into the house after the will was made. *Gayre* v. *Gayre*, 2 Vern. 538. So, where a testator gave to his wife all his personal estate at a place called W., it was held that the words passed whatever personalty the testator had there at the time of his death. *Sayer* v. *Sayer*, 2 Vern. 688. So, a bequest of "my library of books now in the custody of Mr. C.," was held to comprise all the books in the library at the testator's decease, the word "now" not restricting the bequest to the books of which the library was composed at the making of the will, but denoting merely where the library then was. It was compared to a bequest of a flock of sheep *now on such a hill*, which it was said would pass the sheep produced after the making of the will, *it being the case of a collective body*. *Allsouls* v. *Codrington*, 1 P. W. 597. But if the testator has introduced into his description restrictive expressions pointing at present or past time, it is clear that prospective acquisitions are excluded; and, therefore, where a testatrix bequeathed all the goods she *brought* into the house, it was held that no goods passed except what were in the house at the making of the will. *Dormer* v. *Bishop Burnet*, cit. Amb. 281. And if, from the nature of the case, it is evident that the testator refers to the locality, for the purpose of designating specific chattels then in his contemplation, and not with the view of requiring them to answer to the description at any future period, the construction will be made accordingly. As where the captain of a ship bequeaths all his goods and chattels on board a particular ship, it is obvious that he cannot mean goods answering to this description at his death, when he may have no interest in the ship, but that he intends to designate such goods as are then belonging to him, whatever may be their future local situation. *Chapman* v. *Hart*, 1 Ves. sen. 271.

It seems that a legacy of goods in or about a particular house will not carry articles of furniture selected and packed for removal to the house by the testator's order, but not actually removed thither at the time of his decease (*Duke of Beaufort* v. *Lord Dundonald*, 2 Vern. 739*); or furniture purchased by him, but not been sent home

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* But, as to this case, *vide* 3 Atk. 202.

wife, I confirm the settlement made on my marriage with my said wife, whereby she will be entitled during her life to the

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(*Grandison* v. *Pitt*, 2 Vern. 740, n., ed. by Raithby); nor will it comprise goods removed to another house in the testator's lifetime, if such change of locality continues up to the period of his decease. *Heseltine* v. *Heseltine*, 3 Madd. 276. To avoid this consequence, and provide against the contingency of the testator's change of residence, bequests of this nature should be made to comprise the testator's effects which may be in or about *any* house or houses he may happen to occupy at his decease. It is also convenient to extend such a bequest to articles removed from the house for any temporary purpose. (*Vide post*, 448).

In some of the cases, a distinction is hinted at between the effect of necessary and unnecessary removal; but it is unlikely that at the present day the Courts would embarrass themselves with attempting to apply so subtle a distinction. Indeed, the case of *Earl of Shaftesbury* v. *Countess of Shaftesbury*, 2 Vern. 747, seems to be a decisive authority against it; for a bequest by a testator of the goods that should be in his house at R. at his decease, was there held to be defeated by the removal (evidently a necessary one) of the goods from R., on the occasion of the steward, in the absence but with the privity of the testator, giving up the house to the landlord. It was said that the case would have been otherwise, if the removal had been made by fraud or on purpose to disappoint the legacy, or by a tortious act unknown to the testator.

As to bequests of chattels not restricted to a given locality.

In the second class of bequests before referred to, viz. those in which household furniture or other such articles are described without reference to locality, general terms of course are to be used with caution, as otherwise the bequest will extend to the whole personal estate (see *Kendall* v. *Kendall*, 4 Russ. 360), and the claim of the legatee be brought into competition with that of the general residuary legatee, thereby creating one of those perplexing questions in which the Courts have to determine how far general words of description are restricted by the more limited terms with which they stand associated. 3 P. W. 112; 2 Atk. 103; 3 Ves. 311; 13 Ves. 39; 1 Russ. 146. And care should also be taken not to introduce into the bequest an exception of any articles which such bequest would not otherwise comprise, the effect of which necessarily is, to drive the expositor of the will to the alternative of supposing the testator to have meant that the bequest shall receive such a construction as would have extended it to the excepted articles if they had not been expressly excluded, or to have made an unnecessary and incongruous exception. Thus, a bequest of plate, linen, household goods, and other effects (money excepted), has been held to carry stock in the funds, though it is clear that, without the exception, stock would not have passed under the bequest. *Hotham* v. *Sutton*, 15 Ves. 319.

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interest of £——, and also the dividends of £——, Consolidated Three per Cent. Annuities, with a power of appoint-

"Household furniture" and "household goods," how construed.

With respect to the extent of particular expressions, it may be observed, that the terms "household goods," or "household furniture," (which seem to be synonymous), will include household linen (5 Russ. 319); china (*Hele* v. *Gilbert*, 2 Ves. sen. 430), both useful and ornamental; pictures hung up in frames (*Cremorne* v. *Antrobus*, 5 Russ. 319); and, in ordinary cases, even plate (*Nicholls* v. *Osborn*, 2 P. W. by Cox, 419, n.; *Kelly* v. *Powlet*, Amb. 607*; *Stapleton* v. *Conway*, 1 Ves. sen., Belt's Supplement, 187; *Cremorne* v. *Antrobus*, 5 Russ. 319); and fire-arms where used for domestic defence (see 1 Sim. & Stu. 189); but not books, (*Kelly* v. *Powlet*, Amb. 607; *Bridgman* v. *Dove*, 3 Atk. 201; see *Porter* v. *Tournay*, 3 Ves. 314), or globes or mathematical instruments, (*Kelly* v. *Powlet*, Pre. Ch. 207, n.), or, it seems, victuals and housekeeping stores, such as meat, beer, (*Slanning* v. *Style*, 3 P. W. 334; 2 Ves. sen. 280), wines (3 Ves. 314), and other articles whose use is in their consumption, of which therefore an additional mention is requisite, as a testator rarely intends things of this nature to fall into the residue, especially if it be made subject to a trust for sale. Such effects appear to be aptly described by the term "consumable stores," which will comprise some articles not included in the denomination of housekeeping provisions, such as hay, corn, &c.

"Household effects."

The term "household effects" is a more extensive, and therefore seems to be a better general term of description than household goods or furniture. Thus, in the case of *Cole* v. *Fitzgerald*, 1 Sim. & Stu. 189, where a testator gave to E. C. his dwelling-house, garden, and premises at R. for her life, and also all and singular the household furniture *and other household effects of and belonging to him in the said dwelling-house and premises at the time of his decease;* the following articles were found in the

As to articles purchased in way of trade.

* An excepted instance, suggested by the Master of the Rolls in the cited case, is that of a tradesman buying a service of plate as a bargain, and not for his domestic use, which probably would have been deemed an extravagant supposition in those days of plainness and simplicity. His Honor, however, disclaimed being understood to mean that the plate must be in actual use (as suggested by Lord *Hardwicke* in *Snelson* v. *Corbet*, 3 Atk. 370). This exception, indeed, seems to belong to that class of cases in which the gifts under consideration are held not to comprise articles purchased for the purposes of trade; for, it is clear, that a bequest of household furniture by a broker, or of plate by a goldsmith or silversmith, would not pass his general stock, but would be confined to such furniture or plate as the testator had appropriated for domestic use. *Pratt* v. *Jackson*, 2 P. W. 302; *Le Farrant* v. *Spencer*, 1 Ves. sen. 97.

ment thereof amongst my children as therein is mentioned. AND I GIVE AND BEQUEATH to the said [*trustees, including*

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dwelling-house and premises at the testator's death—four fowling pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a grey pony, a cow, a haystack, and a considerable stock of wines and liquors:—Sir *J. Leach*, V.C.—"The words 'household furniture and other household effects' will comprise all property in the house and on the premises intended for use and consumption therein, or for the ornament thereof. E. C. is therefore entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot*, books, and wine and liquors; but not to the pony, cow, or fowling-pieces, unless it is proved that they were kept for the defence of the house. If the haystack was only for use, it would pass; if for sale, it would not pass." On appeal (3 Russ. 301), Lord *Lyndhurst* concurred in his Honor's decision: his Lordship observing—"It is clear that this testator, by adding to 'household furniture' 'other household effects,' meant to carry his bequest further than merely to household furniture. The only question is, how far the word 'effects' is controlled by the word 'household;' and though some doubt may be entertained with respect to the wines and liquors, the books, and the turning machinery, I do not see any sufficient reason for excluding any of them from the bequest to E. C."

If the word "effects" had not been restrained by association with "household," the bequest in question would clearly have comprised the pony and domestic animals, which were held (contrary, no doubt, to the testator's real intention) not to pass—though it is always to be remembered that words in themselves the most extensive are susceptible of restriction from, and are often narrowed by, their juxta-position with less comprehensive terms, being considered to point to articles *ejusdem generis*. *Boon* v. *Cornforth*, 2 Ves. sen. 280.

Running horses held to pass under a bequest of goods and chattels.

In the case of *Countess Gower* v. *Earl Gower*, 2 Eden, 201, Lord *Northington* held, that even running horses passed under a clause in Earl Gower's will, by which he declared his desire that all his plate, furniture, household goods, and all books and other furniture of his library, and all stores and implements of all sorts and kinds, *and other goods and chattels whatsoever which should be in and about his dwelling-house and outhouses at Trentham at his death*, and all other his plate and household linen, (except as therein excepted) should be preserved for, upon, and be held and

* This seems to be a mistake: the parrot was held not to pass. *Vide* 3 Russ. 301, n.

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Bequest of leasehold messuage to trustees to permit his wife to occupy it for her residence; and after her decease, or if she should decline to reside, upon trust to sell same.

eldest son], all that my leasehold messuage situate and being in —— Square, in the said county of Middlesex aforesaid, and the stables, buildings, and other appurtenances thereunto belonging, for all the estate, term, and interest which I shall have therein at the time of my decease, To HOLD the same unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts hereinafter mentioned concerning the same; that is to say, UPON TRUST to permit and suffer my said wife to reside in and occupy the said leasehold premises, so long as she shall think proper, she paying the ground rent and taxes payable in respect of the same, and keeping the said premises in good and tenantable repair, and insured against loss or damage by fire during the period of such residence; and from and after the decease of my said wife, or from and after she shall decline or cease to reside in and occupy the said leasehold premises (*b*), then I direct and declare that my

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enjoyed by such person or persons as should be entitled to the testator's estates in the counties of Stafford and Salop, by virtue of the limitations in his son's marriage settlement; Lord *Northington* observing, that the testator's intention was, that nothing about his seat at Trentham should be disturbed to the prejudice of the then earl, but that every thing both of profit and amusement should pass.

What length of non-occupation is a breach of a condition requiring residence.

(*b*) Where a testator imposes on a devisee an obligation to reside, it is sometimes a question what length of continuous absence amounts to a breach of the condition. The question in the present instance might be obviated by such a clause as the following:—

"AND I direct that in case my said wife shall be absent from the messuage hereinbefore bequeathed, for the space or period of six calendar months at any one time, she shall be deemed and considered as declining or ceasing to reside therein within the intent and meaning of this my will."

In the recent case of *Doe* v. *Steward*, 3 Nev. & Man. 372, a testator bequeathed to A. a leasehold messuage, in case he should so long live and continue to inhabit the house; and after his decease, or giving up the possession, or in case he should mortgage the same, then over. A. went to sea, leaving his wife and family in the occupation of the premises, and was absent six months. A commission of bankrupt issued against him. It was held that the going to sea did not amount to a "giving up" of the premises, and the Court considered it to be doubtful whether his being turned out of them by the assignees under the bankruptcy satisfied these words, which seemed to imply a voluntary desertion.

said trustees, or the survivors or survivor of them, his executors, or administrators, or other the trustees or trustee for the time being of this my will, do and shall sell and dispose of the said leasehold messuage and premises, either by public sale or private contract. And I empower the said trustees or trustee, if it shall be deemed expedient, to purchase in the said premises at any auction or auctions, and also to enter into special stipulations relative to the title to be deduced to the said premises, or any other matter connected with the sale thereof, and also to rescind or vary the terms of any contract or contracts for sale that may have been entered into. And I DIRECT, that the money to arise by such sale or sales shall become and constitute part of my general residuary personal estate. And I further empower the said trustees or trustee, in their or his discretion (notwithstanding the trusts aforesaid), to postpone the sale of the said leasehold premises so long as they or he shall think proper, and during such postponement the rents and profits thereof shall be paid to the person or persons for the time being entitled to the income of my residuary personal estate. And I GIVE, DEVISE, AND APPOINT all that my messuage or mansion house, in the parish of ——, in the county of ——, with the gardens, park, and pleasure grounds thereto belonging; and also my freehold estate at ——, in the county of ——, purchased by me of ——, and all other my real estates, wherever situate, and also all the real estates over which I have a general power of appointment or disposition, to the uses following, that is to say, *To the use* of my eldest son the said [*name*], and his assigns, during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate, then *To the use* of the said [*trustees*], and their heirs, during the natural life of the said [*eldest son*], UPON TRUST, by the usual means, to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed; but, nevertheless, to permit my said eldest son [*name*], and his assigns, during his life, to receive the rents and profits thereof for his and their own use and benefit; and from and after the decease of the said [*eldest son*], *To the use* of the first, second, and all and every son and sons of my said son [*eldest son*], severally, successively, and in remainder, one

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Monies arising from sale to form part of personal estate.

Devise and appointment of real estates,

To the use of eldest son and his assigns, for life; remainder,

To trustees during life of son, to preserve; remainder,

To the first and other sons of eldest son successively in tail

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after another, as they shall respectively be in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his and their body and respective bodies; and for default of such issue [*Here insert limitations to the testator's second son* [*name*], *and his first and other sons in tail male in like manner, with remainder to the testator's third son* [*name*] *for life, and to his first and other sons in like manner*]; and for default of such issue, *To the use* of the said [*trustees exclusively of eldest son*], their heirs and assigns, for ever, UPON TRUST, as soon as conveniently may be after the decease and failure of issue male of my said several sons as aforesaid, to sell and dispose of the said real estates hereinbefore devised and appointed, either together or in parcels, by private contract or public sale, with such accompanying powers in relation to such sale or sales as are hereinbefore expressed and given concerning my leasehold messuage in —— aforesaid; and as to the money arising from the sale of the said real estates, I direct that my trustees or trustee for the time being of the estates lastly hereby devised shall and do stand possessed thereof, UPON TRUST to pay and divide the same unto, between, and among such of my daughters as shall be living at the time of my decease and at the decease of the survivor of my said sons, and such failure of issue male of their respective bodies as aforesaid, share and share alike, if more than one, and if but one, then to such one daughter only; and in case any of my said daughters shall die previously to the decease of my said sons, and such failure of issue male of their respective bodies as aforesaid (whether in my lifetime or after my decease), leaving one or more child or children living at the time of her decease, and who shall be living at the time of the decease of the survivor of my said sons, and such failure of issue male as aforesaid (*c*), and shall attain the age or re-

male; remainder,

To second and third sons, and their issue, in like manner; remainder,

To trustees, in trust to sell,

and divide proceeds among testator's daughters living at his death, and failure of issue of his sons; and in case of deaths of any before such failure, leaving children, such children to take their parent's share.

(*c*) This bequest, although not to take effect until after an indefinite failure of issue, is valid; the persons, the failure of whose issue is to entitle the legatees, being devisees in tail. The gift, therefore, notwithstanding its remoteness, does not involve the danger of a perpetuity. *Vide ante*, p. 51.

spective ages of twenty-one years, then I will and direct that such child or children of every such daughter so dying, of and in the said trust monies shall be entitled to the share which his, her, or their deceased parent would have been entitled to, if living, at the death of the survivor of my said sons, and such failure of issue male as aforesaid; and that such share shall be equally divided between and among such children, if more than one, share and share alike. And I direct and declare, that, in case, at the time of the decease of the survivor of my said sons, and such failure of issue male as aforesaid, any of the children of any deceased daughter of mine shall be under the age of twenty-one years, the annual income arising from the expectant or apparent share of each such minor shall be applied for his or her maintenance and education until such share shall become vested, or he or she shall previously die. And I further direct and declare, that upon the sale or sales of any part of the trust premises hereinbefore made saleable, and upon any and every other occasion, the receipt or receipts of the trustees or trustee for the time being of this my will shall be a good and sufficient discharge or good and sufficient discharges for so much of such purchase money or other monies paid to the said trustees or trustee, as in such receipt or receipts shall be expressed to have been received, and that the purchaser or purchasers, or other person or persons paying the same, shall not afterwards be obliged to see to the application thereof, or be answerable or accountable for any loss or misapplication of the same, or any part thereof. And I further direct and declare, that any purchaser of the leasehold premises hereinbefore made saleable shall not be bound to inquire whether my said wife shall have declined or ceased to reside therein, nor shall such purchaser be affected by express notice that my said wife has not declined or ceased to reside in the said premises. And I hereby declare and direct, that it shall be lawful for my said sons respectively, when and as they shall come into possession of my messuages, lands, and hereditaments limited to them for life respectively as aforesaid, to lease or demise the same or any of them, or any part or parts thereof, to any person or persons for any term or number of years not exceeding twenty-one years in possession, so that in every such lease there be reserved, payable during the continuance thereof, the

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Income to be applied for maintenance during minority.

Receipts of trustees to be good discharges to purchasers.

Purchaser of leasehold premises not bound to inquire as to propriety of sale.

Power for the sons when in possession to lease.

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most improved yearly rent that can be reasonably had or obtained for the same, without taking any fine or premium for or in respect of such lease or leases (*d*). AND I GIVE AND BEQUEATH all and singular my household goods and furniture, books, pictures of every description in frames, plate, linen, china, and glass, which shall be in and about my mansion house at —— aforesaid, at the time of my decease (including any articles which shall or may have been removed therefrom for repair or any other temporary purpose (*e*),) to the said [*trustees*], their executors and administrators, UPON TRUST, that my said trustees shall, immediately after my decease, or as soon as conveniently may be, cause an inventory to be made and taken of the said furniture and effects; AND, UPON FURTHER TRUST, to permit and suffer my said eldest son [*name*] to use and enjoy the said furniture and effects during his life; and from and after his decease, then UPON TRUST to permit and suffer the same furniture and effects to be used and enjoyed by the eldest or only son for the time being of the said [*eldest son*] to be begotten, until such eldest or only son, for the time being, shall first attain the age of twenty-one years, or die leaving issue male of his body living at the time of his death, which shall first happen, and then in trust for such eldest or only son for the time being attaining the age of twenty-one years, or dying and leaving issue male as aforesaid, which shall first happen, his executors, administrators, and assigns (*f*); AND if there shall be no son of the said [*eldest son*], or, there being any such son or sons, he or they shall die before any of them shall attain the age of twenty-one years, without leaving issue male of his or their body or bodies lawfully begotten living at his or their respective decease or deceases, then UPON TRUST for and to permit and suffer the said furniture and effects to be used and enjoyed by my said son [*second*

Bequest of household goods to trustees, to make an inventory thereof,

and upon trust to permit eldest son to use and enjoy the same for his life;

and after his death, in trust for his eldest or only son attaining twenty-one, or dying and leaving issue male; and if none such, then upon trust for the testator's other sons, and their sons, in similar manner;

(*d*) It will be observed that this will does not contain a power of sale and exchange, nor are the tenants for life empowered to make jointures and charge portions for younger children. For examples of these several clauses, *vide* last precedent.

(*e*) *Vide ante*, p. 441.

(*f*) See a different, and, it is conceived, a better form of a bequest of effects as heir looms, *ante*, p. 435.

son], and his eldest or only son for the time being, or one of them, for such and the like interest or interests, and in such and the like manner and form as the same premises are hereinbefore given in trust for my said [*eldest son*], and his eldest or only son for the time being, or one of them, as aforesaid; AND if there should be no son of the said [*second son*], or there being any such son or sons, he and they shall all die before any of them shall attain the age of twenty-one years, without leaving issue male of their body or bodies lawfully begotten living at his or their respective decease or deceases, then UPON TRUST for and to permit and suffer the said furniture and effects to be used and enjoyed by my said son [*third son*], and his eldest or only son for the time being, or one of them, for such and the like interest or interests, and in such and the like manner and form in all respects, as the same premises are hereinbefore given in trust for my said son [*eldest son*], and his eldest or only son for the time being, or one of them, as aforesaid; AND if there should be no son of my [*third son*], or there being any such son or sons, he or they shall all die before any of them shall attain the age of twenty-one years, without leaving issue male of his or their body or bodies lawfully begotten living at his or their decease or respective deceases, then I direct and declare, that the said furniture and effects lastly hereby bequeathed shall fall into and be deemed and considered as part of my general residuary personal estate. AND I GIVE AND BEQUEATH unto the said [*trustees*], and my said wife, the sum of £——, to be paid to them at the end of twelve calendar months next after my decease, but without interest in the meantime, upon the following trusts, that is to say, UPON TRUST to lay out and invest the same in the names of the said trustees in the public stocks or funds of Great Britain, or on real security in England (with power to change the securities as often as it shall be deemed expedient so to do), and to pay the dividends or interest arising therefrom from time to time into the proper hands of my daughter [*married daughter*], wife of [*husband*], of ——, for and during her life, so that the same may be for her separate use and benefit, independently of her said husband, or any future husband, and may not be subject to his debts, control, contracts, or engagements; and also so that the said [*daughter*] may

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and if there shall be no son of any of testator's sons who shall attain twenty-one, or die under twenty-one, leaving issue male at his death, the furniture and effects to fall into the residue.

Pecuniary legacy to trustees, in trust for testator's married daughter for life, for her separate use, and not to be disposed of by anticipation.

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not make any assignment or appointment by way of anticipation of the said interest or dividends, or any part thereof; and from and after the decease of my said daughter, UPON TRUST to pay or transfer the said sum of £——, or the stocks, funds, or securities in or upon which the same shall be invested, unto and among all and every, or any or more of the children or more remote issue of my said daughter [*name*] (whether the parent or ancestor of such issue shall be living or dead, but such issue being born in the lifetime of my said daughter), in such shares and proportions (if more than one), and at such time or times, and subject to such conditions, restrictions, and limitations, for the benefit of some or one of the said children or issue, as my said daughter [*married daughter*], whether covert or sole, by any deed or deeds, instrument or instruments in writing, under her hand and seal, with or without power of revocation or new appointment (*g*), or by her last will and testament in writing, or any testamentary writing, shall direct, appoint, give, or bequeath the same; and in default of such direction, appointment, gift, or bequest, and as to so much of the said legacy or sum of £——, stocks, funds, and securities, to which any such direction, appointment, gift, or bequest shall not extend, IN TRUST for all and every the child and children of my said daughter who, being a son or sons, shall live to attain his or their age or respective ages of twenty-one years, or being a daughter or daughters shall live to attain her or their age or respective ages of twenty-one years or be married, which shall first happen, equally to be divided between or among them, share and share alike. AND in case there shall be only one such child of my said daughter, who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain that age or be married, IN TRUST for such only child. And in case there shall be, at the time of the decease of my said daughter, any child or children of such daughter, whose share or respective shares of and in the said sum of £——, or the stocks, funds, or securities whereon the same shall be invested shall not be then vested in him, her, or them re-

After death of daughter, for her children and issue, as she shall by deed or will appoint.

In default of appointment, for all the children equally.

In case of only one child, then for such only child.

In case of any children being under age at the death of testator's daughter, trustees to apply income of their respective shares towards

(*g*) If deemed necessary, insert a clause restricting the exercise of the power, as in a former precedent, Vol. 9, p. 324.

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spectively, UPON TRUST that the said trustees or trustee for the time being shall and do in the meantime, from and after the decease of my said daughter, (subject to any contrary direction or regulation to be contained in any such appointment by my said daughter as aforesaid), pay and apply the interest, dividends, and annual proceeds of the expectant or apparent share of every such child, of and in the said sum of £——, stocks, funds, and securities, for or towards his or her maintenance, support, and education, until the share of such child shall become vested, or he or she shall previously die. But in case there shall be no child of my said daughter, who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain that age or be married, then UPON TRUST to pay, apply, and transfer the said sum of £—— stocks, funds, and securities, in such manner, and to and for such trusts, intents, and purposes as are herein mentioned and declared with respect to the residue of my personal estate. PROVIDED ALWAYS, and I hereby declare, that no child or children of any daughter of mine who shall take any share or shares of the said trust monies, stocks, funds, or securities, by virtue of any appointment or appointments to be made by any such daughter under the power hereinbefore contained, shall, without an express declaration to that effect therein, be entitled to any share of the unappointed part of the said trust monies, stocks, funds, or securities, unless such child or children shall bring the share or shares appointed to him or them respectively into distribution with the other child or children of such daughter, and make an allowance for the same. AND I GIVE AND BEQUEATH the sum of £—— unto my six other children [*names*], equally to be divided among them, share and share alike, and to be paid to my said lastly-named children respectively at the end of twelve calendar months next after my decease, but without interest in the meantime, but the respective shares of my said six children to be interests vested in them respectively immediately upon my decease. AND in case any of my said six children, being a daughter or daughters (*h*), shall not have attained the age of twenty-one years or have previously married (with the consent of my

their maintenance.

If all of them die before acquiring a vested interest, the money to sink into the residue.

Hotchpot clause.

Pecuniary legacy among testator's other children, equally, payable within twelve months after testator's death, but vested immediately on his decease.

Shares of children under age to be invested, and the income

(*h*) The sons had attained their majority.

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said wife, if living) at the expiration of the said twelve calendar months next after my death, then, and in such case, it is my will, that the share or proportion of each such daughter who shall not have attained the said age or have sooner married as aforesaid, of and in the said sum of £——, shall be invested and laid out on government or real securities in the names of the trustees for the time being of my residuary personal estate, (and whom I empower to change the securities as often as it shall be deemed expedient so to do), in trust for such respective daughter of mine who shall be under age and unmarried as aforesaid, and to be transferred to such daughter upon her attaining her said age of twenty-one years, or being previously married with the consent of my said wife, if living, as aforesaid; and the dividends and interest thereof shall be paid and applied in or towards her maintenance, support, and education during her minority, in such manner as the said trustees shall think proper, or until her marriage. PROVIDED ALSO, and I hereby declare, that in case any of my said six children lastly mentioned shall die in my lifetime, leaving any child or children (*i*) who shall be living at my decease, and who shall live to attain the age of twenty-one years, then, and in such case, it is my will that the child or children attaining the said age of each such child so dying in my lifetime shall represent and stand in the place of his, her, or their deceased parent or respective parents, and shall be entitled to the same share or shares,

applied to their maintenance, and the surplus to accumulate.

In case any of the children die in testator's lifetime leaving issue, such issue to take their parent's share;

Respective extent of the words "children" and "issue."

(*i*) This clause, it will be observed, lets in, by way of substitution for the deceased legatees, their children merely, and not issue generally; so that it would not embrace the share of a child dying in the testator's lifetime leaving a grandchild but no child. In using the words "issue" and "children," attention should always be paid to their respective and various import. If, by the word "issue," the testator means to designate issue of every degree, the intention should be declared in so many words, or, at all events, every expression which might give rise to an argument for restricting the word "issue" to children should be carefully avoided. On the other hand, if the testator's bounty is intended for children exclusively, the objects of the gift should be invariably described and referred to by the word "children," in preference to "issue," as more completely preventing misconstruction. It seems, that where the share to which issue are to succeed is described as their *parents'* share, the testator is considered to have explained himself to employ the word "issue" in the sense of *children*. *Sibley* v. *Perry*, 7 Ves. 522.

as well original as accruing, in the said legacy or sum of £——, which his, her, or their deceased parent or parents would have been entitled to if living at the time of my decease; and such share and shares to be divided between or among such children, if more than one, in equal proportions, and if there shall be only one child, then to go to such only child; and if any of the children of any deceased daughter of mine shall be under the age of twenty-one years, the annual income arising from the expectant or apparent share of each such minor in the said legacy of £—— shall be applied by my said trustees or trustee in and for his and her maintenance and support. PROVIDED ALSO, and I further declare, that in case any of my said six children shall die in my lifetime without leaving any children or child who shall be living at my death, or, leaving such, he, she, or they shall die under the age of twenty-one years, then, and in every such case, the share or respective shares, as well original as accruing, of my child or children respectively so dying of and in the said legacy or sum of £—— shall go and belong to and be divided equally between or among all my children who shall be living at the time of my decease, including my said daughter [*married daughter*], if she shall be then living, and the child or children of any child or children who shall be then dead, such grandchild or grandchildren to take the share or respective shares of his, her, or their deceased parent or parents only; the shares of the said children and grandchildren respectively to be vested and payable or transferable at the like ages or times, and in the like manner in all respects, as his, her, or their original share or shares is or are hereby directed to be vested and to be paid or transferred; and the share of my said daughter [*married daughter*] to be subject to and held upon the same trusts, and for the same intents and purposes as are hereinbefore expressed concerning the legacy or sum of £—— hereby bequeathed in trust as aforesaid. AND I DIRECT, that my said wife shall have and be entitled to interest after the rate of *5l.* for every one hundred pounds in the year, upon or in respect of the said sum of £—— hereinbefore by me bequeathed as aforesaid, or such part of the said sum of £—— as I shall not have advanced to my said children as hereinafter mentioned, which shall accrue between my death and the expiration of the said twelve calendar months, at which the said several legacies

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Clause of accruer as to the shares of children dying in testator's lifetime.

Testator's wife to take the interest on children's legacies until payable, to maintain the children.

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become payable, to the intent that my said wife shall, by and out of such interest, provide for the maintenance and education of my said children, or for whose benefit the same bequests are hereinbefore bequeathed, in such manner as she shall think proper during the said twelve calendar months, without being liable to be called to an account for or by reason of any irregularity in the distribution or division of the said interest (*k*). AND I HEREBY GIVE AND BEQUEATH all

Bequest of the

As to giving trustees a power of settling legacies of daughters marrying under age.

(*k*) It is often convenient to give trustees a power of settling the legacy of a female marrying during minority, not only as a protection to the legatee against the consequences of an imprudent marriage, but because it may happen that, otherwise, no effectual settlement can be made. Such is necessarily the case where the intended husband, as well as the wife, is a minor, since neither party can be concluded by any act done whilst in this state of disability. (*Vide ante*, Vol. 9, p. 30.) Where the legacy is *reversionary*, the minority of the wife alone will prevent it from being absolutely settled, as the title which would accrue to her by survivorship, in case of the legacy not being reduced into possession during her husband's life, would not be bound by the contract of her husband, (*vide ante*, Vol. 9, p. 29), though he were adult, and therefore competent to bind himself, and, by consequence, to make an effectual settlement of such personalty as absolutely accrues to him *jure mariti*. It is observable, that the incapacity of a woman marrying under age to settle her reversionary equitable choses en action does not terminate with minority, she being, when that incapacity ceases, under the continuing disability of coverture (supposing, of course, the property not to be subject to a trust for separate use, with an unrestricted power of alienation). Hence the importance of giving to trustees a power of settling the reversionary legacy of a female minor on marriage. Powers of this nature, too, it is to be remarked, would derive a great accession of importance from the doctrine, discussed in a subsequent note, which denies validity to future or prospective trusts for the separate and inalienable use of unmarried females, if this doctrine should unfortunately become established.

Power to trustees to settle the legacies of daughters marrying under twenty-one.

"PROVIDED ALWAYS, and I hereby direct and declare, that in case any or either of my said daughters shall, after my decease, marry, while she or they respectively shall be under the age of twenty-one years, then, and in every such case, it shall be lawful for the trustees or trustee for the time being of my residuary personal estate and effects, if they or he shall think proper, but not otherwise, to settle the whole or any part of the legacy or legacies, as well original as accruing, hereinbefore bequeathed to such daughter or daugh-

the residue and remainder of my personal estate and effects, of what nature or kind soever and wheresoever, unto the said [*trustees*], UPON TRUST, that they or the survivors or survivor of them, his executors or administrators, or other the trustees or trustee for the time being of the said residuary estate and effects, shall and do, with all convenient speed after my decease, sell, dispose of, and convert into ready money such part of the residue of my personal estate as shall not, at the time of my decease, consist of or be invested upon any share of the public stocks or funds or other government securities of Great Britain and Ireland, or upon real securities in England, and receive, recover, and get in all such credits and sums of money (except as aforesaid) as shall be due and owing to me at the time of my decease, from any person or persons whomsoever; AND, UPON FURTHER TRUST, that the said trustees or trustee shall and do lay out and invest the monies which shall arise by such sale or sales of the residue of my said personal estate, and to be received, got in, and pro-

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residue of personal estate to trustees to convert it into money and invest the proceeds.

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ters respectively, UPON TRUSTS for the benefit of such daughter or daughters respectively, and her or their child or respective children, or more remote issue, similar to and corresponding with the trusts hereinbefore declared concerning the legacy of £——, hereby bequeathed, IN TRUST for my said daughter [*married daughter*], and her children and more remote issue, as aforesaid, or upon such other trusts, and subject to such other powers and provisions for the benefit of the daughter or daughters respectively so marrying, and her or their husband or husbands, child and children, or more remote issue and next of kin, or any or either of them, and reserving such powers and authorities to the trustees for the time being of such settlement, in relation to the said legacy or legacies respectively, as my said trustees or trustee shall think proper. And I further direct and declare, that the receipt or receipts of the trustees or trustee of every such settlement respectively shall be an effectual discharge or effectual discharges to my executors and trustees for the time being, for any sum or sums of money, stocks, funds, or securities, which shall or may be paid or transferred to the trustees or trustee of such settlement respectively, and that the expense of every such settlement shall be paid out of the funds comprised therein."

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duced as aforesaid, in their or his own names or name, in the public stocks or funds or other government securities of Great Britain and Ireland, or upon real securities in England, at interest; and shall and do, from time to time, at their or his discretion, call in, receive, sell, transfer, and dispose of all or any part of the said last-mentioned stocks, funds, and securities, and also such part of the residue of my personal estate as shall, at the time of my decease, consist of such stocks, funds, or securities, and shall and do lay out and invest the monies to arise by such callings in, sales, transfers, and dispositions, in the names or name of the said trustees or trustee for the time being, upon new or other stocks, funds, or securities of the like nature, and so to be varied and transposed from time to time as often as occasion shall require; AND, UPON FURTHER TRUST, that the said trustees and trustee shall and do stand possessed of and interested in the said residue of my personal estate, and the stocks, funds, and securities in or upon which the same shall, from time to time, be invested, and the interest, dividends, and yearly produce thereof, upon the trusts and for the intents and purposes hereinafter expressed concerning the same, that is to say, UPON TRUST, from time to time, to pay to, or authorize and empower, permit and suffer my said wife to receive the dividends and interest thereof to and for her own use and benefit during her life; and from and after her decease, UPON TRUST to stand possessed of and interested in the said residue of my personal estate, and the stocks, funds, and securities in or upon which the same shall have been invested or laid out, in trust for all and every my children who shall be living at the time of the decease of my said wife, and the issue then living of such of them as shall have died in the lifetime of my said wife (*l*), or some one or more of such children and issue respectively, in such shares and proportions, and to be paid or transferred at such time or respective times after the decease of my said wife, and subject to, with, and under such conditions and limitations over (such conditions and limitations over being for the benefit of some or one of my said children, or of the issue of such deceased child or

Power to change securities.

Trustees to stand possessed of securities,

in trust for wife for life; after her death, for the children living at her decease, and the issue of such of them as shall die in her lifetime as she shall by deed or will appoint.

(*l*) In general, it seems to be advisable that these powers should authorize an appointment to the issue of children living and dead, *ut ante*, p. 450.

children), and in such manner as my said wife (being sole and unmarried) shall, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing, or any testamentary writing, direct or appoint; and in default of such direction or appointment, or in case of the cesser or determination of the said power of appointment, or any appointment or appointments to be made in pursuance thereof, under the proviso for that purpose hereinafter contained, and as to any part or parts of or interest in the residue of my said personal estate, stocks, funds, and securities to which any such direction or appointment shall not extend, IN TRUST for all and every my children or child who shall be living at the decease of my said wife, equally to be divided between or among them, if more than one, share and share alike, and the child or children then living of such of the said children (if any) as shall have died in the lifetime of my said wife. But I direct, that the child or children of each such deceased child shall be only entitled to the share which his, her, or their deceased parent would have been entitled to if living at the decease of my said wife; and that the share which shall belong to the child or children of each such deceased child shall be equally divided between or among such children, if more than one, share and share alike, and if there shall be only one child, then such share shall wholly belong to such only child. AND I HEREBY DIRECT, that in case any such child or grandchild who shall be entitled as aforesaid shall be under the age of twenty-one years at the time of the decease of my said wife, the interest and dividends or income of the share of each such child and grandchild of and in the residue of my personal estate, stocks, funds, and securities, under or by virtue of the trusts hereinbefore contained, shall be applied for or towards his or her maintenance, support, and education during his or her minority. And in case there shall be no such child or grandchild living at the decease of my said wife, then as to the said residuary personal estate, stocks, funds, or securities, IN TRUST for such person or persons and such intents and purposes as my said wife, by her last will and testament in writing, or any testamentary writing, shall direct, appoint, give, or bequeath the same, or any part or parts thereof.

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In default of appointment, in trust for all testator's children living at wife's decease, and the children of such of them as shall die in her lifetime per stirpes.

In case there shall be no child or grandchild, then in trust for such persons as wife shall by will appoint.

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In default of appointment, in trust for her executors or administrators.

In case wife marries, such power of appointment to cease.

In case testator advance any of his children in his lifetime, such advancement to be taken as part of their legacies, except as to the first legacy to married daughter.

Power to executors to continue loan to testator's son-in-law.

Also to suspend conversion of foreign government securities.

AND in default of such direction or appointment, gift or bequest, and as to any part of the said trust premises to which the same shall not extend, then IN TRUST for the executors or administrators of my said wife, as part of her personal estate. PROVIDED NEVERTHELESS, and I declare, that in case my said wife shall happen to marry after my decease, then, and in such case, the power of appointment hereinbefore reserved to her in respect of the residue of my personal estate (*m*), and any appointment or appointments which shall have been made in pursuance thereof, shall, from and after such her marriage, cease and determine. PROVIDED ALSO, and I hereby declare, that if any sum or sums of money shall have been advanced by me previously to my decease to any of my daughters as a marriage portion, or any sums of money shall have been advanced by me to any of my sons, and an entry or entries of the last-mentioned monies shall be found in my private books of account, called ——, under the titles of their names respectively, and denominated legacy account, such sum or sums so advanced (whether to daughters or sons) shall be deemed part or parts of the legacy or legacies given to him, her, or them respectively by this my will, save and except as to the said legacy of £—— hereby given upon trust for the benefit of my said daughter [*married daughter*], and which I direct shall not be subject to any reduction or diminution in respect of any advancement to her. AND WHEREAS my said son-in-law [*name*] is indebted to me in the sum of £——, for which I hold his bond, dated the —— day of ——, Now, I hereby authorize and empower the executors or trustees for the time being of this my will, in their discretion, to defer and postpone the calling in of such bond debt or any other debt which may be owing to me from the said [*son-in-law*] at the time of my decease for such period as the executors or trustees shall think proper. AND WHEREAS it is probable that, at the time of my decease, some part of my personal property may be invested upon foreign government securities, and it may be

(*m*) It will be observed, that the wife's power of appointment over the residue is confined to appointments by *will*. Such a provision as that in the text, indeed, would only be proper where the power is testamentary, as an appointment by deed ought not to be liable to be defeated by subsequent circumstances affecting the personal situation of the donee.

inexpedient immediately to sell and convert the same, I therefore authorize and empower my executors and trustees to suspend the execution of the trusts for sale and conversion hereinbefore contained in regard to such investment, so long as they shall think proper. And I direct, that the income arising from such part of my personal estate as shall from time to time remain unsold and unconverted shall, from the day of my decease, go and be applied to such person or persons, and for such purposes, as the income arising from the securities to be purchased with the proceeds thereof would have gone and been applicable under the trusts aforesaid (*n*). And I further empower my executors and trustees for the time being to compound for debts owing to my estate, and at discretion to relinquish or suspend any claim or demand which they may have against any person or persons whomsoever, by virtue of this my will. And I further empower the said executors and trustees to pay any sum or sums of money which shall be claimed (and in their opinion shall be justly claimed) to be owing by me, although the same may not happen to be recoverable at law from a defect of evidence or any other cause; and also to refer to arbitration any disputes which may arise in relation to any trust estate. And I further declare, that in case the trustees or trustee for the time being of this my will shall deem it to be unnecessary and inexpedient to apply to and for the maintenance, education, and support of any child or children, or the issue of any child or children of mine, during minority, the whole of the annual income, which, by virtue of the trusts aforesaid, is made applicable to such purpose, then, and in every such case, the said trustees or trustee do and shall apply in and to such maintenance, education, and support, so much only of the said annual income as they or he shall deem adequate and proper for the purpose, and do and shall, from time to time, invest in their or his own names or name the residue or unapplied part of the said annual income; and the monies so invested and accumulated as aforesaid shall from time to time be added to and follow the destination of the capital or principal of the fund whence the same shall

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Also to compound debts, &c.

Discretionary power to trustees to regulate amount of maintenance.

Unapplied income to be accumulated.

(*n*) The doctrine connected with this clause is fully discussed in a former volume. *Vide ante*, Vol. 6, pp. 307, 311.

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have arisen, and shall be subject to all the trusts and provisions herein expressed concerning the same; nevertheless, I hereby declare, that, as well the principal as the income of such accumulated fund shall be and remain applicable, notwithstanding the investment thereof, to the maintenance, education, and support of the minor, from whose share or presumptive or expectant share the same shall have arisen at any subsequent period of his or her minority. AND I FURTHER DECLARE, that it shall be lawful for the said trustees or trustee, if they or he shall think proper, to pay over any sum or sums of money which, under or by means of the trusts of this my will, is or are made applicable to the maintenance, education, and support of any minor, to his or her parent or guardian, if any, to be so applied, and such trustees or trustee shall not be bound to see to the application thereof by such parent or guardian; And I further declare, that it shall not be incumbent on my trustees or trustee, previously to paying or applying any sum or sums of money for the maintenance and support of any minor, by virtue of the trusts aforesaid, to ascertain whether there is any other fund applicable to such purpose, or whether any person or persons is or are liable to provide such maintenance and support, any rule of equity to the contrary notwithstanding (*o*).

Power to trustees to pay maintenance-fund to parent or guardian,

and to apply same without inquiry.

Points to be attended to in framing provisions for maintenance.

(*o*) In framing maintenance clauses, a clear expression of the intention on the following points is requisite.

1st. Whether the whole income, or part only, is to be applied; if part only, then as to the destination of the excess; also to confer on the trustees (if it is intended that they shall have) full discretion in regard to the extent and manner of the application; if the excess is to be accumulated, the accumulated fund should be declared to remain applicable to maintenance.

2nd. Whether the trustees are themselves to apply the maintenance-fund, or are to pay it to the parent or guardian of the minor for this purpose, or (which is generally preferable) they are to have a discretion to do either the one or the other?

3rd. Whether the fund is to be applied in exoneration of or merely in aid of any other maintenance provision, and also, if the objects of the trust are not the testator's own children, whether it is to be applicable, without regard to the father's ability to provide maintenance.

4th. Where the testator has several funds devoted to the purposes of maintenance, the unapplied surplus of which are *variously* disposed of,

Lastly, I hereby appoint the said [*trustees*] and my said wife executors and executrix of this my will; And I appoint my

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the order and the proportions in which the income of the several funds is to be applied should be stated.

Whether income may be applied for maintenance, without regard to the father's ability.

With respect to exempting trustees from the necessity of inquiring into the father's ability to provide maintenance, the point is certainly now of less importance than formerly, when maintenance was not allowed, even under an express direction, until the father's inability to provide it was ascertained. *Andrews* v. *Partington*, 3 B. C. C. 60; *Pulsford* v. *Hunter*, Id. 417. The case of *Hoste* v. *Pratt*, 3 Ves. 730, seems to have been the first which broke in upon this rule, Lord *Loughborough* there observing—"I think the parent is entitled to an allowance for maintenance here, *without any inquiry as to his ability*, for there is an express direction for maintenance;" though his lordship afterwards assigned a reason, grounded on the particular circumstances of the case before him, namely, that, as the maintenance provision did not include all the children, by refusing maintenance he should diminish the ability of the father to provide for children who were not embraced by it.

Since this period, maintenance has frequently been allowed in the case of infants, whose parents were in affluent and even opulent circumstances; the Court considering that, having regard to the amount of the children's fortunes, and the exigencies of the parent's family, his income was not so large as to exclude his claim to be relieved from the burthen of his children's maintenance by the appropriation of the fund in question.

Thus, in the case of *Jervoise* v. *Silk*, Coop. Ch. Rep. 52, where the father, who sought for maintenance, had 6000*l.* a year, the Court allowed 1400*l.* a year for the maintenance of his six children, whose aggregate incomes amounted to 8600*l.* a year. The principal ground for the claim, in this instance, was the expensiveness of the parent's establishments, which included one town house and two country houses; Sir *Wm. Grant* observing—"It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman, 6000*l.* a year would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman, it may be otherwise. On the outside it here would seem enough: at the same time, the expenses of his establishment, and his children's expectations, are circumstances to be looked to. It would be a harsh thing for the Court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own." It does not appear whether, in this case, there was any express direction to apply the income for maintenance.

And even in the much earlier case of *Cavendish* v. *Mercer*, 5 Ves. 195, n., maintenance was allowed out of the annual proceeds of a large

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said executors and executrix, and the survivors and survivor of them, guardians and guardian of such of my daughters as

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residue, without any express direction, in exoneration of a father, whose income was 1800*l.* a year, but whose children were numerous, and not all included in the provision in the will: a circumstance which appears always to have had much weight in inducing a liberal allowance.

In the case of *Ex parte Penleaze*, 1 B. C. C. 387, Belt's ed. n., 400*l.* a year was allowed for the future maintenance (in addition to an allowance for past maintenance) of an infant, whose then income was 760*l.* a year, and who, in the event of his surviving his mother, would become entitled to an additional income of 800*l.* per annum. The allowance was ordered to be paid to the infant's father, the amount of whose income does not appear, but his wife (the infant's mother) derived 2000*l.* a year under the same will for her separate use, independently of the father.

If, however, it may be collected from the will, that the testator does not mean the income to be applied in exoneration of any other funds, but only in case there is an absence of other sources of provision, the construction of course will conform to this view of the intention.

Thus, where the will authorized the trustees to apply for maintenance so much of the infant's share or proportion *as might be necessary*, Sir *R. P. Arden*, M. R., held, that no part of the income could be applied until all other appropriations, come from what quarter they might, had been exhausted; and therefore, as it appeared that an ample fund for maintenance had been provided for the infants by the will of their father, no part of the income in question could be applied. *Rawlins* v. *Goldfrap*, 5 Ves. 440.

As to allowances to parents for past maintenance.

Formerly, an allowance for past maintenance was always refused to a parent; the fact of his having actually maintained the infants being considered as a conclusive proof of his ability to do so (*Andrews* v. *Partington*, 3 B. C. C. 60); but, at the present day, the Court will listen to any reasonable application for past as well as future maintenance. *Reeves* v. *Brymer*, 6 Ves. 425; *Sisson* v. *Shaw*, 9 Ves. 288; *Ex parte Penleaze*, 1 B. C. C. Belt's ed. 387, n. In the case of *Maberly* v. *Turton*, 14 Ves. 499, the trustees were authorized to apply the income for maintenance, with the approbation of the father and mother or the survivor. The trustees died; the father was the executor, and having himself for sometime maintained the infants, now claimed an allowance for such past maintenance. Lord *Eldon* directed the Master to inquire whether it would have been proper in any trustee acting in the execution of the will, to apply any and what part of the interest and dividends towards the maintenance of the children, and in what proportions, the Master having regard to the situation, circumstances, and ability of the father, and the fortunes of his children.

shall at the time of my decease be under the age of twenty-one years and unmarried, during the period of such their minority and discoverture. PROVIDED ALWAYS, and I hereby declare, that if the said trustees nominated and appointed by this my will respectively as aforesaid, or any or either of them, shall die in my lifetime, or shall at my decease decline to accept, or become incapable of accepting, the trusts of this my will, or if the said trustees, or any or either of them, or any future trustee or trustees to be appointed in the place and stead of them or any of them as hereinafter is mentioned, shall at any time or times after my decease die or be desirous of being discharged from, or decline or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, then and in every such case it shall be lawful for the surviving or continuing trustees or trustee of the trust premises (*p*), the trustee or trustees of which shall so die or be desirous of

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Power to appoint new trustees.

Upon the whole it appears, that though Courts of equity have not professedly renounced all inquiry into the parent's ability to maintain his children, in determining the applicability of any given fund, yet they are disposed to admit so many considerations, as, reconciling the allegation of inability with apparent affluence, that the denial of the claim is restricted to a few extreme cases. Still, however, as judicial opinions on the point have greatly fluctuated and may again fluctuate, and the adjudications do not place the parent's claim on such a broad ground as to exclude controversy, it seems to be advisable expressly to exonerate trustees from the necessity of inquiring into the father's ability to provide maintenance, or into the applicability of any other fund, previously to their application of income destined to this purpose.

Mother not bound to maintain her legitimate children.

It should be observed, that where the *mother* is the only surviving parent, it is unnecessary to preclude inquiry into the fact of ability, she being under no obligation to maintain her legitimate children. *Billingsly* v. *Critchet*, 1 B. C. C. 268; *Tubb* v. *Harrison*, 4 D. & E. 118; *Cooper* v. *Martin*, 4 East, 76. In these cases certainly, the non-liability of the mother's second husband was the only point decided; but, it seems difficult to rest the husband's exemption on any grounds which would not exonerate the mother herself.

Where there are several maintenance clauses, it conduces to brevity to insert a general provision, embracing the several particulars to which attention has been recommended in the present note, rather than to repeat them in each instance.

(*p*) It will be observed, that there are several distinct classes or sets of trustees.

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being discharged, or decline or become incapable to act as aforesaid, by any writing or writings under their, his, or her hands and seals or hand and seal, from time to time to nominate and appoint any other person or persons to be a trustee or trustees in the stead or place of the t rustee or trustees so dying or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; [(q) And that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, lands, tenements, hereditaments, monies, and premises which shall then be vested in the trustee or trustees so dying, desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall thereupon with all convenient speed, at the cost of my trust estate, or of that part thereof to which such nomination and appointment shall relate, be conveyed, assigned, and transferred in such sort and manner, and so that the said premises shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, and such new or other trustee or trustees; or, if there shall be no continuing trustee or trustees of the same trust premises, then in such new trustee or trustees only, and his, her, or their heirs, executors, administrators, and assigns, To the same uses and upon the same trusts as are hereinbefore declared concerning the same trust estate, monies, and premises respectively, the trustee or trustees whereof shall so die or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid, or such of them as shall or may be then subsisting and capable of taking effect; And that all and every such new trustee and trustees shall and may, as well before as after the execution of such conveyance and assignment as aforesaid, act and assist in the management, carrying on, and execution of the trusts to which he, she, or they shall be so appointed in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates, monies, and premises, if there shall be any such trustee or trustees, if not, then by himself, herself, or them-

(q) The part in brackets may be omitted from the clause without diminution of its efficacy.

selves, as fully and effectually and with the same powers and authorities in all respects, as if he, she, or they had been by this my will nominated a trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed a trustee or trustees, anything hereinbefore contained to the contrary thereof notwithstanding]. And I direct that my said executors and trustees for the time being, shall not be answerable or accountable for the acts, deeds, receipts, or defaults of each other, but each of them for his or her own acts, deeds, neglects, and defaults only (*r*); And that the said executors and trustees respectively shall not be answerable or accountable for any loss which may happen to the said premises, unless the same shall happen by their own wilful neglects or defaults respectively; And that each of the said executors and trustees for the time being shall and may

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Indemnity to the trustees and executors.

(*r*) A full dissertation on the responsibility of trustees and on the inefficacy of the ordinary indemnity clauses to diminish and restrict it, will be found in a former volume (*Vide ante*, Vol. 8, p. 362). If it be really intended by the author of the trusts that one trustee shall not be answerable for another, he should afford a more special and marked indication of such intention than is disclosed by the clause in the text, as that clause is judicially interpreted. For this purpose, the following addition may be made thereto—

Inefficacy of ordinary indemnity clauses to exonerate trustees.

"And especially I hereby declare it to be my will and meaning, that in case and so often as any trustee for the time being of this my will shall pay over to or cause or permit any co-trustee to receive any sum or sums of money, in order and to the intent that the same may be applied by such co-trustee for the purposes of this my will, it shall not be incumbent on the trustee making such payment, or causing or permitting such receipt, to see or inquire into the application of the said monies, or to ascertain the truth or accuracy of any representation made by his co-trustee concerning the same, nor shall the trustee who shall make default in any of the particulars aforesaid, be responsible for any loss which shall arise to the said trust estate by reason thereof, any rule of equity to the contrary notwithstanding. Nevertheless, I declare that this exemption from legal responsibility shall not abridge or affect the right of any trustee to inquire into the transactions of his co-trustee or co-trustees, and I feel convinced that it will not abate the friendly circumspection of my trustees."

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reimburse himself and herself, and allow to his and her co-trustees or co-trustee all such costs, charges, and expenses as they respectively shall or may incur in or about the execution of the trusts of this my will. And I hereby revoke all other wills by me at any time heretofore made, and declare this only to be my last will and testament. In witness, &c.

ONLY SON AND HIS ISSUE IN STRICT SETTLEMENT.

WILL *devising* Real Estate *to Testator's only* Son *for* Life, *with* Remainder *to his* Sons successively *in* Tail General, *with Remainder to his (Son's)* Daughters *concurrently in* Tail *General, with* Cross-Remainders *among the* Daughters, *with Remainders over.* Power *to Persons entitled in Possession to* renew Leases *of* Copyholds, &c. Power *to Testator's* Son *to* charge Estates *with* Jointure *for any* Wife, *and also with* Portions *for* Younger Children; *and in the Event of his dying without leaving Issue to* charge *Estates by* Will *with a Sum of Money.* Bequest *of* Personalty *to Son* absolutely.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I give and devise all that my manor of ——, and also all that my messuage or mansion house, called ——, with the lands and appurtenances thereunto belonging, situate at ——, in the county of ——, and also all that my advowson and right of patronage to the rectory and church of —— aforesaid, and all other my messuages, farms, lands, tenements, hereditaments, and real estate whatsoever and wheresoever (except the hereditaments vested in me as mortgagee or trustee), to the uses and upon the trusts following (*a*), that is to say, *To the use* of my son

Devise of real estate;

To testator's

Suggestion as to the mode of devising to uses.

(*a*) Where lands are intended to be limited by will to uses in strict settlement or any other series of uses, it is better to devise them directly to the intended cestuis que use than through the medium of a

ONLY SON AND HIS ISSUE IN STRICT SETTLEMENT.

[*name*] and his assigns, for and during his natural life, without impeachment of waste, (except voluntary waste in pulling down houses or other buildings and not rebuilding the same); And from and after the determination of that estate by forfeiture or otherwise in his lifetime, *To the use* of [*trustees*], of &c. and their heirs, for and during the natural life of my said son, UPON TRUST to preserve the contingent remainders hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions and do such other acts as occasion may require; but, nevertheless, to permit and suffer my said son and his assigns to receive and take the rents and profits of all the said hereditaments, and to present to the said church of —— during his natural life; And from and after the decease of my said son, *To the use* of the first son of the body of him my said son [*name*], and the heirs of the body of such first son; and in default or on failure of such issue, *To the use* of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said [*son*], and the heirs of the body and bodies of every such son severally and successively, as they respectively shall be in seniority of age, the elder of such sons and the heirs of his body being always preferred to the younger of such sons and the heirs of his and their body and bodies; And in default or on failure of such issue of my said son, *To the use* of all and every the daughter and daughters of the body of him my said son [*name*], and the heirs of the body and respective bodies of such daughter and daughters, equally to be divided between or among such daughters, if more than one, share and share alike, as tenants in common and not as joint tenants (*b*); and if there shall be but one such daugh-

only son for life; remainder,

To trustees to preserve; remainder,

To first and other sons of testator's son successively in tail general; remainder,

To son's daughters in tail general as tenants in common.

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devisee to uses, in order to prevent the devise from being affected (if it would be affected) by the decease of such devisee in the testator's lifetime, according to the doctrine suggested by Sir Edward Sugden in his Treatise on Powers, 5th ed., p. 138. Another objection to such mode of framing the devise is, that if the testator has a power of appointment and the devise happens to operate as an execution of such power, the effect is to transfer the use to the first nominee of the testator; in other words, to vest the legal estate in the devisee to uses, (who is really intended to take nothing), and confer on the intended cestuis que use equitable interests only.

(*b*) The limitations in this precedent in giving estates tail general to

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ter, then *To the use* of such only daughter and the heirs of her body. And in case there shall be more than one such daughter, and there shall be a failure of issue of the body or bodies of any one or more of such daughters, then as to both the original part and share, or parts and shares of such daughter or daughters respectively, whose issue shall so fail; and also such other part and share or parts and shares in the said hereditaments, as, by virtue of this present clause, shall have become vested in or have accrued unto such daughter or daughters respectively, or her or their issue, upon the failure of issue of any other or others of the same daughters, *To the use* of the remaining and other and others of the same daughters, and the heirs of the body and respective bodies of such remaining and other daughters, equally between or among them (if more than one), share and share alike, as tenants in common, and not as joint tenants; and if there shall be but one such remaining or other daughter, then *To the use* of such only daughter and the heirs of her body; and in default or on failure of such issue, *To the use* [*other limitations*]. PROVIDED ALWAYS, and I hereby declare, that it shall be lawful for my said son, and all and every other person or persons who, for the time being, shall be seised of or be in the actual possession of or entitled to the rents and profits of the said manor of ——, and of the lands and tenements thereto belonging, under the uses aforesaid, and to and for the said [*trustees*], or the survivor of them, his executors or administrators, during the minority of such person or persons, or any of them (if more than one), who for the time being may happen to be under age, (with the concurrence of the person or persons so entitled, if any, who shall have attained the age of twenty-one years) to regrant or renew, by copy of court roll, any copyhold tenements within or held of the same manor, and also to fill up or grant and renew leases for lives or for terms of years determinable upon lives, of all such parts or parcels only of the same last-mentioned lands and tenements as are now or at my decease may be out upon any such lease or leases for life or lives, or for any term or

Cross remainders in tail among the daughters.

Special power to renew leases of copyholds, in addition to the ordinary power of leasing.

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the sons of the testator's son successively, with remainder to his (the son's) daughters in tail general concurrently, differ from those of any former precedent. Such limitations are very common in marriage settlements.

ONLY SON AND HIS ISSUE IN STRICT SETTLEMENT.

terms of years determinable upon any life or lives, so that there be reserved upon such last-mentioned lease or leases the old and accustomed rent or rents, heriots and services, or proportional parts thereof, for or in respect of the same lands, tenements, and premises so to be granted, renewed, or leased; and also to lease all or any part of the said messuages, farms, lands, tenements, hereditaments, and premises hereby devised, for any term or terms of years not exceeding twenty-one years, to commence and take effect in possession and not in reversion, so that there be reserved by every such last-mentioned lease the most improved yearly rent or rents, that, at the time of the granting thereof, can be reasonably obtained for the premises thereby to be demised; and that the lessee or lessees, in every lease or leases lastly hereby authorized as aforesaid, be not made dispunishable for waste by any express words therein, and that the lessee or lessees of or in every such lease or leases as aforesaid do execute a counterpart or counterparts thereof respectively; but I declare, that a memorandum indorsed on such lease, and subscribed by the person or persons granting the same, acknowledging the receipt of such counterpart, shall be and be deemed to be conclusive evidence of the existence thereof. [*Add powers of sale, exchange, and enfranchisement, as in former precedents*]. PROVIDED ALSO, and I further declare, that it shall be lawful (*c*) for my said son, by any deed or deeds under his hand and seal, attested by one or more credible witness or witnesses, or by his last will and testament in writing, or any testamentary writing, to grant, limit, settle, or appoint to or for the use of any and every woman whom he shall happen to marry (and that either before or after such marriage), for and during the term of the natural life of such woman, for or in the name or names of her jointure or part of her jointure, any annual sum or yearly rent charge, not exceeding £—— by the year, free from and without any deductions for taxes or otherwise, to be issuing

Power to testator's son to jointure any wife.

(*c*) It is more usual, and seems in general to be rather better, to place the powers of jointuring and charging portions, and other powers affecting the beneficial interest, *before* the power of leasing and sale and other clauses relating merely to the management of the property.

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and payable out of and to be charged and chargeable upon all or any part or parts of the said hereditaments hereby devised, with usual powers of distress and entry upon and perception of the rents and profits of the hereditaments so to be charged therewith, for receiving and recovering the same annuity or yearly rent charge when in arrear, and to raise, create, and demise such term or terms of years of or in the same hereditaments, and to declare such trusts, powers, and provisoes for the better securing, raising, and paying of the same rent charge, from and immediately after the decease of my said son, as are usually contained in grants of the like jointures or rent charges. PROVIDED ALSO, and I further declare, that it shall be lawful for my said son, by the same or any other deed or deeds, instrument or instruments in writing, to be executed and attested as aforesaid, or by his last will and testament in writing, or any testamentary writing, to be duly executed and attested for the devise of freehold estates, to charge all and every or any of the said manor, messuages, farms, lands, tenements, hereditaments, and premises, with the payment of such sum or sums of money as he shall think fit, not exceeding in the whole the sum of £——, for or towards the portion or portions of all and every or any of the daughter or daughters and younger son or younger sons of my said son who shall attain the age of twenty-one years or marry (*d*), and who shall not be entitled or presumptively entitled to the said hereditaments in remainder immediately expectant on the decease of the said [*son*], and also with the payment of such yearly sum or sums of money as he shall think fit, for or towards the maintenance and education of the daughter or daughters and younger son or younger sons for the time being of my said son until her or their portion or respective portions shall become vested and payable, so as the same do not exceed the interest of

Power to testator's son to charge estates with portions for younger children.

(*d*) Observe that the power of charging portions differs from the forms of the like power, *ante*, pp. 371, 400, in being made exercisable in favour of children who attain majority or marry only, (as to which, *vide* an observation, *ante*, Vol. 9, p. 324). Another diversity is, that the power is reserved to a single tenant for life, which renders unnecessary some clauses and topics of consideration which are applicable where such a power is reserved to a series of successive tenants for life. *Vide ante*, p. 397.

ONLY SON AND HIS ISSUE IN STRICT SETTLEMENT.

such his, her, or their portion or respective portions, or presumptive or expectant portion or respective portions, after the rate of 4*l.* per centum per annum, and to raise, create, and demise such term or terms of years of or in the said manor and hereditaments so to be charged therewith, for securing, levying, raising, and paying such portion or respective portions and maintenance as is or are usually limited or created for the like purposes. PROVIDED ALSO, and I further declare, that, in case my said son shall die without leaving lawful issue, who shall be living at his decease, it shall be lawful for him, by his last will and testament in writing, or any testamentary writing, to be duly executed and attested for the devise of freehold estates, to subject and charge all or any of the aforesaid manor, messuages, farms, lands, hereditaments, and premises, or any part or parcel thereof, to and with the payment of any sum or sums of money not exceeding in the whole the principal sum of £—— of lawful money of Great Britain and Ireland, unto any person or persons whomsoever, and for such uses, intents, and purposes as he shall think proper; and, for securing the payment of such sum or sums so to be charged, with interest, by such will or testamentary writing, to limit or create any term or terms of years whatsoever of or in the estate and premises so to be charged, or any part or parcel thereof, as is or are usually limited or created for the like purposes. [*Add power to receive and apply rents during the minority of any tenant or tenants in tail, ut ante*, p. 395]. AND as to all the personal estate and effects whatsoever and wheresoever, of which I shall be possessed at the time of my decease, (after payment thereout of my debts, funeral expenses, and the charges of proving this my will), I give and bequeath the same and every part thereof unto my said son [*name*], for his own absolute use and benefit. AND I nominate and appoint my said son [*name*], to be the sole executor of this my will. AND I DEVISE to my said son all the freehold and copyhold estates whatsoever vested in me as mortgagee or trustee, *To hold* the same unto and to the use of my said son, his heirs and assigns, for ever, subject nevertheless to such equities and trusts as for the time being shall or may affect the same estates respectively. [*Add power to appoint new trustees and revoking clause*]. IN WITNESS, &c.

Power to son, in case of his dying without leaving issue, to charge estates with a sum of money by will.

Bequest of personal estate.

Appointment of executor.

Devise of mortgage and trust estates.

ORDINARY WILL OF REALTY AND PERSONALTY.

WILL *containing* BEQUESTS *of* SPECIFIC *and* PECUNIARY LEGACIES, *the latter to be paid in* NUMERICAL ORDER; *Authority to* TRUSTEES *to* COMPLETE *or* RELINQUISH *a* CONTRACT *to purchase an Estate entered into by Testator.* GENERAL DEVISE *and* BEQUEST *of* REAL *and* PERSONAL *Estate to* TRUSTEES, *upon Trust to* SELL, *and out of the Proceeds to* APPROPRIATE *and invest a* SUM *of Money to answer an Annuity, bequeathed to Testator's* WIFE *during* WIDOWHOOD, *to be reduced in case of Marriage. Disposition of Residuary* MONIES *among* CHILDREN. *Moiety of* DAUGHTERS' SHARES *to be held in Trust for their* SEPARATE USE, *with an ulterior Trust for their* CHILDREN; *and in Default of* CHILDREN, *in Trust as* DAUGHTERS *by* WILL *shall* APPOINT; *and in Default, for Daughters'* NEXT *of* KIN. PROVISIONS *for* MAINTENANCE *and* ADVANCEMENT *of Testator's* CHILDREN *and* DAUGHTERS' CHILDREN. POWER *to Trustees to* SUSPEND SALES, POSTPONE PAYMENT *of* LEGACIES, COMPOUND DEBTS, *pay* DEMANDS *without legal* EVIDENCE, *and* SUBMIT DISPUTES *to* ARBITRATION; *also to* VARY SECURITIES, GIVE DISCHARGES. INDEMNITY *to and Power of* CHANGING TRUSTEES. *(Variation illustrating Mode of* POSTPONING VESTING *of* GRANDSONS' SHARES *until the* AGE *of* TWENTY-FIVE.*)*

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. IN the first place I nominate and appoint [*executors*], of &c., to be executors of this my will. I GIVE unto my wife [*name*] all my housekeeping provisions and consumable stores (except wines and spirits), and also all my poultry, pigs, and other live stock, for her absolute use. I ALSO BEQUEATH to my said wife such of my furni-

Appointment of executors.

Bequest to wife

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ture, plate, linen, china, wine, spirits, and utensils, as she shall choose and select, to the value of £——, which I direct to be ascertained by two sworn appraisers, the one to be appointed by my said wife, and the other by my executors hereinbefore named, or by any other means which shall be agreed upon between my said wife and my said executors. I GIVE AND BEQUEATH the several pecuniary legacies following, that is to say, *First*, I GIVE to my said wife the sum of £——, to be paid to her immediately after my decease. *Secondly*, I GIVE to each and every of the children of my body now born and hereafter to be born, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, (including my daughter [*illegitimate daughter*], who resides with me, and is now aged —— years, or thereabouts), the sum of £—— a piece, the same several legacies to be paid as soon as circumstances will permit after my decease, and to bear interest from the day of my death at 4*l.* per centum per annum. And my will is, that if at my death any child or children of mine, being a son or sons, shall be under the age of twenty-one years, or, being a daughter or daughters, (including the said [*illegitimate daughter*]), shall be under that age and unmarried, then, and in such case, his, her, or their expectant or presumptive legacy or legacies of £—— shall be laid out and invested by and in the names or name of the trustees or trustee for the time being of this my will in some or one of the public stocks or parliamentary funds or other government securities of Great Britain, or at interest upon real security in England (to be from time to time altered and varied as occasion shall require); and the interest, dividends, and annual produce of the same legacy or legacies respectively, and of the stocks, funds, or securities in or upon which the same shall be invested, and, if it shall be deemed advisable by the said trustees or trustee, any part or share not exceeding one half of the capital or principal of such legacy or legacies, stocks, funds, or securities respectively, shall be paid and applied in and towards the maintenance, education, and advancement in life of such child or children to whom the same legacy or legacies respectively shall presumptively belong, in such manner as the said trus-

of furniture, &c. of a certain value.

Pecuniary legacies: 1. To wife.

2. To each of his children, including a natural daughter.

Direction to invest children's legacies until payable,

and apply the interest, or a portion of the capital, for maintenance and advancement.

ORDINARY WILL OF REALTY AND PERSONALTY.

tees or trustee shall think proper (*a*). But if either or any of my said children, being a son or sons, shall die under the age of twenty-one years, or, if the said [*illegitimate daughter*], or any or either of the said children, being a daughter or daughters, shall die under that age without being or having been married, then my will is, that the expectant legacy or legacies of him, her, or them so dying, and the stocks, funds, or securities in or upon which the same shall be invested, shall sink into and form part of the residue of my personal estate hereinafter disposed of. *Thirdly*, I give to the said [*trustees*] the sum of £—— a piece for their trouble in the execution of this my will, to be retained by them out of my personal estate at the end of twelve calendar months next after my decease. *Fourthly*, I give to the infirmary at —— the sum of £——, to be paid to the treasurer for the time being thereof, at the end of twelve calendar months as aforesaid, out of such part of my personal estate as the law permits to be bequeathed to charitable purposes (*b*). *Fifthly*, I give to my nephew [*name*], the sum of £——, to be vested in and payable to my said nephew when and as soon as he shall have attained the age of twenty-one years, but without interest in the meantime. And my will is, that the several pecuniary legacies, classes of legacies, and sums of money by me given and directed to be paid, as aforesaid, shall have priority and be discharged in the numerical order and course in which the same are respectively given as aforesaid, the legacies to my children and executors respectively being considered as of equal degree among themselves. And whereas, I have contracted with [*vendor*], of &c., for the purchase of certain freehold messuages and hereditaments at ——: Now, I hereby authorize and direct my said executors either to complete such purchase or relinquish the same, as circumstances may require, and as my said executors, in their discretion (if it shall be a matter of choice), shall judge most expedient. And I authorize my executors to accept such a title (whether strictly marketable or not) as

The legacy of any of them dying under age to sink into the residue.

3. To executors, for their trouble.

4. To charity.

5. To nephew.

Legacies to be discharged according to their numerical order.

Recital of a contract by the testator for the purchase of an estate.

Discretionary power to trustees to relinquish or complete the contract.

(*a*) The legacy being of small amount, no provision is made for the event of the income exceeding what would be sufficient for maintenance.

(*b*) *Vide ante*, p. 27.

ORDINARY WILL OF REALTY AND PERSONALTY.

they, in their discretion, shall deem it prudent or advisable to accept. And I give, devise, and bequeath unto the said [*executors*], all and singular my messuages, lands, tenements, and real estate, whatsoever and wheresoever, and of what tenure or quality soever, whether in possession, reversion, remainder, or expectancy, and whether at law or in equity (including the hereditaments by me contracted for as aforesaid, if the purchase thereof shall be completed); and also all my ready money, shares in the public stocks or funds, or moneys on securities, goods, chattels, and other personal estate and effects whatsoever not hereinbefore disposed of, *To hold, receive, and take* the said real and personal estate and premises respectively unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns, respectively, according to the several natures or qualities thereof respectively; but upon and for the trusts, intents, and purposes following (that is to say), as to all the said real estate, Upon trust, that they the said [*trustees*], and the survivor of them, their or his heirs or assigns, do and shall, with all convenient speed after my death, absolutely sell and dispose of all and singular the same premises unto any person or persons, either by public auction or private contract, or both, and in such lots or parcels and manner as they or he shall think proper, with power to purchase in the same at any auction or auctions, and also to rescind or alter any contract for sale actually entered into, and to make and enter into special conditions and stipulations with any purchaser or purchasers relative to title or otherwise, and do and shall for the purpose of carrying into effect such contracts for sale, make and execute all necessary conveyances and assurances to the respective purchasers thereof, or as they shall order and direct. And as to the personal estate and effects so bequeathed as aforesaid, Upon trust, that the said [*trustees*], and the survivor of them, their or his executors, administrators, or assigns, do and shall, with all convenient speed after my decease, sell and dispose of, collect, get in, and receive the same, and every part thereof. And as to the moneys to arise from the sale of the said messuages, lands, and other real estate, so by me directed to be sold as aforesaid, and also as to the said personal estate and effects hereinbefore bequeathed, and the

General devise and bequest of real and personal estate to trustees.

Habendum,

upon the following trusts:

To sell the real estate;

To convert personalty into money.

And as to the moneys arising from the real and personal estates;

ORDINARY WILL OF REALTY AND PERSONALTY.

moneys to arise therefrom, my will is, that the said [*trustees*], or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, do and shall in the first place, from and out of the same several moneys and premises, pay and satisfy all the just debts which shall be due and owing by me at my death, and my funeral and testamentary charges and expenses, together with the several pecuniary legacies by me bequeathed as aforesaid, when and as the same shall respectively become due and payable; and do and shall, in the next place, lay out and invest in their or his names or name, in some or one of the parliamentary stocks or public funds or other government securities of Great Britain, or upon real securities in England, the residue or surplus of the said trust moneys and premises which shall remain after answering the purposes aforesaid, (from time to time altering, varying, and transposing the same stocks, funds, and securities, or any of them, and also any part or parts of my said residuary personal estate and effects which shall consist of stocks, funds, or securities not converted into money in the first instance, as my trustees for the time being shall think proper). And my will is, and I hereby direct, that my trustees or trustee for the time being do and shall appropriate and set apart such or so much of the said stocks, funds, or securities, as will, at the time of such appropriation, yield or produce from the dividends, interest, or annual produce thereof, the clear yearly sum of £——; and do and shall, with or out of the dividends, interest and annual produce of such appropriated funds, or, failing the same, then with or out of the principal fund, pay or cause to be paid unto my said wife or her assigns during her life, if she shall so long continue my widow, for her or their own benefit, one annuity or clear yearly sum of £——, which I hereby give and bequeath to my said wife accordingly. But if my said wife shall marry again, then do and shall, with or out of the dividends, interest, or annual produce of such investment, or, failing the same, then, with or out of the principal fund, pay or cause to be paid unto my said wife or her assigns during her life, for her or their own benefit, one annuity or yearly sum of [*reduced annuity*], which I hereby give and bequeath to my said wife in that event, in lieu of the said annuity

In the first place, to pay debts, funeral and testamentary expenses, and legacies,

and then to lay out the residue on government or real securities,

and to appropriate a sum sufficient to produce an annuity of £——,

and to pay such annuity to testator's wife during her widowhood;

but if she should marry again, then a less annuity.

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of [*original annuity*]; the said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to be paid free and clear from all deductions and abatements whatsoever, and to be paid in equal half-yearly portions, on the —— day of ——, and the —— day of ——, in every year; the first payment of the said annuity of [*original annuity*] to be made on such of the said half-yearly days of payment as shall next happen after my death; and the first payment of the said annuity of [*reduced annuity*] to be made on such of the said half-yearly days of payment as shall next happen after the marriage of my said wife; and, until such appropriation as aforesaid, the said annuities respectively to be discharged out of my general personal estate. PROVIDED ALWAYS, and my will is, that in case the said annuity of [*reduced annuity*] shall become payable, by means of the second marriage of my said wife, then my trustees or trustee for the time being shall continue and keep appropriated so much and such part only of the stocks, funds, or securities, which they or he shall have originally appropriated to answer the said annuity of [*original annuity*], as shall be sufficient, with or out of the dividends, interest, and annual produce thereof, at the time of such appropriation, to discharge the said annuity of [*reduced annuity*]; and the residue of the stocks, funds, or securities so appropriated, shall fall into and form part of my residuary estate and funds hereinafter disposed of. AND as to the residue of the moneys to arise from my real estate, and also as to my personal estate and the moneys to arise therefrom, and the stocks, funds, or securities in or upon which all such moneys shall be laid out and invested after the appropriation by me before directed of funds to answer the said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to my said wife as aforesaid, and also as to the whole of such appropriated funds after the decease of my said wife; and as to a proportionable part thereof as aforesaid after her second marriage, if that event shall happen, my will is, and I hereby direct, that the trustees or trustee for the time being of this my will shall stand and be possessed of and interested in all and singular the said residuary moneys, stocks, funds, securities, and premises, IN TRUST for all and every the child and children of my body now born and hereafter to be born, who, being a son or sons, shall attain the age of twenty-five

Either annuity to be paid half-yearly,

and until such appropriation, to be paid out of general personal estate.

Proviso, that if the reduced annuity should become payable, trustees to keep appropriated a fund sufficient only to discharge that annuity,

and the residue of the funds originally appropriated to sink into the residuary personal estate.

As to the residue of the moneys arising from the real and personal estates;

Trustees to stand possessed thereof,

In trust for testator's children; sons at twenty-five, or mar-

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years, or marry under that age, or, being a daughter or daughters, shall attain the age of twenty-one years, or marry under that age, including my said daughter [*illegitimate daughter*], if she shall attain the said age or marry, to be divided between and among such children, if more than one, as shall become entitled to the same, in equal shares and proportions. AND if there shall be but one such child, then the whole of the said residuary trust moneys, funds, and premises, to be in trust for such only child. PROVIDED ALWAYS, NEVERTHELESS, and my will is, that in case at my death any son or sons of mine shall be under the age of twenty-five years and unmarried, or my said daughter [*illegitimate daughter*], or any other daughter of mine, shall be under the age of twenty-one years and unmarried, then, and in every such case, my trustees or trustee for the time being shall, from and after my decease, during such time as each such last-mentioned son or daughter shall respectively be under such age, and unmarried as aforesaid, receive and take the dividends, interest, and annual produce of the presumptive or expectant portion or share of each and every such last-mentioned son and daughter respectively of or in the said residuary trust moneys, funds, and premises, and pay and apply the same, or an adequate part thereof, in or towards the maintenance and education of such last-mentioned child and children, in aid of the provision by me already made for such maintenance and education (*c*); and do and shall accumulate and improve the residue, if any, of such dividends, interest, and annual produce, by laying out and investing the same and the produce thereof, from time to time, in the names or name of my trustees or trustee for the time being, in some or one of the parliamentary stocks or public funds, or other government securities of Great Britain, or upon real securities in England, to be altered and varied as they or he shall think fit; nevertheless, I direct and declare, that such accumulated fund, or any part thereof, shall or may be afterwards applicable

riage, and daughters at twenty-one or marriage.

If only one child, the whole for such child.

Power to trustees to apply the interest of portions of sons under twenty-five and unmarried, and of daughters under twenty-one and unmarried, for maintenance and education,

and to accumulate the residue, if any.

(*c*) It will be observed, that the provision for advancement out of the capital is not extended to the shares in the residuary property. Though clauses of this nature are usual and convenient, their insertion is not quite so much a matter of course, as that of the clause directing the income to be applied for maintenance.

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for the maintenance and education of the child or children respectively, from whose presumptive share or respective shares the same shall have arisen. And my will is, that all such accumulations and increase, or so much thereof as shall not be eventually applied as last aforesaid, shall belong to the person or persons who, under the trusts of this my will, shall become absolutely and indefeasibly entitled to the principal fund or funds from the dividends, interest, and annual produce whereof such accumulations shall have been produced. Provided also, and my will further is, that when and as my said daughter [*illegitimate daughter*], and any other daughter or daughters of mine, shall attain the age of twenty-one years or shall marry, then and thereupon one moiety or equal half part only of the portion or share of each and every such daughter, of and in the said residuary trust moneys, funds, and premises, and of the accumulations therefrom, if any, shall absolutely belong and be paid to her or them, and the remaining moiety or equal half part of the last-mentioned portion or share of each and every of them my said daughter [*illegitimate daughter*], and any future daughter or daughters, and the accumulations therefrom, if any, shall go and be held and applied upon and for the trusts, intents, and purposes following, (that is to say), my trustee or trustees for the time being shall, during the life of each and every of them my said daughter [*illegitimate daughter*], and any such other daughter or daughters, pay and apply the interest, dividends, and annual produce of the last-mentioned moiety or half part of her portion or share of the said residuary trust moneys, funds, and premises, and of the accumulations therefrom, unto such person or persons, and for such purposes, as each and every such daughter, shall, from time to time, when and as the same or any part thereof shall become due, but not by way of assignment, charge, or other anticipation thereof, direct, free from the debts and control of the husband for the time being of each such daughter (*d*); for which purpose it is my will, that the receipts in writing of each and every such daughter, or such her appointee respectively as aforesaid, shall, notwithstand-

Accumulations to belong to persons eventually entitled to principal funds.

Proviso, that when the daughters attain twenty-one or marry, one moiety only of their portions to be paid them,

and the remaining moiety to be held upon the following trusts:

Trustees to pay the interest of such last moiety,

for their separate and inalienable use;

(*d*) It will be observed, that here no provision is made for eluding the new doctrine respecting trusts extending to future coverture, as in the precedent next but one.

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ing the coverture of each such daughter, be effectual discharges for such of the interest, dividends, and annual produce hereby made payable to her or them respectively as aforesaid, as shall be thereby acknowledged to be received. AND from and after the decease of my said daughter [*illegitimate daughter*], and of each such daughter of mine hereafter to be born, my will is, that such last-mentioned moiety of each and every such daughter's portion or share, the benefit of which moiety is hereby given to her for her life as aforesaid, of or in the said residuary trust moneys, funds, securities, accumulations, and premises, shall go and be in trust for all and every the child or children of every such daughter, who, being a son or sons, shall attain the age of twenty-one years (*e*), or, being a daughter or daughters, shall attain that age or marry, to be equally divided between and among such children, if more than one.

and after the decease of the daughters, the last-mentioned moiety to be held in trust for all their children; for sons at twenty-one, and daughters at twenty-one or marriage.

(*e*) The doctrine against perpetuities, discussed *ante*, p. 37, does not admit of the vesting of the shares of the daughters' unborn sons being absolutely postponed to the age of twenty-five, at which age the testator has made the shares of his own sons, not previously marrying, to vest. The object, however, may be effected conditionally, by the insertion of such a clause as the following:

Proviso conditionally postponing the vesting of shares of daughters' sons until the age of twenty-five.

"PROVIDED ALWAYS, and I hereby declare, that if any son or sons of any daughter or daughters of mine shall attain the age of twenty-one years before the expiration of twenty-one years computed from the time of the decease of the survivor of my children and more remote issue (if any) living at the time of my decease, then, and in such case, the vesting of the share of each such grandson in the said trust moneys and premises shall be postponed to the end or expiration of such term of twenty-one years, or until the attainment by such respective grandson to the age of twenty-five years (which shall first happen), any thing hereinbefore contained to the contrary notwithstanding."

This alternative vesting of the shares conforms to the rule of law, while it exposes the testator's design—the postponement of the vesting until the age of twenty-five—to very little actual danger of being frustrated, as in all probability the whole line of daughters' sons will have attained twenty-five before the expiration of twenty-one years posterior to the extinction of the survivor of the testator's descendants of every degree living at his decease. The most proper place for this clause would seem to be immediately after the series of trusts.

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And if but one child, the whole of the moiety for such one child.

If no child, to be in trust as the daughters shall by will appoint;

AND if there shall be but one such child, then the whole of such last-mentioned moiety of the said portion or share shall go to and be in trust for such only child of such daughter (*f*); and if my said daughter [*illegitimate daughter*], or each or any of my daughters hereafter to be born, shall die without having a child who shall survive me, and who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then the last-mentioned moiety of the portion or share and interest of each such daughter so dying of or in the said residuary trust moneys, funds, accumulations, and premises, shall go to and be IN TRUST for such person or persons, for such intents and purposes, and with and subject to such powers and provisoes as each such last-mentioned daughter, by her last will and testament or any testamentary writing, shall from time to time, whether sole or married, direct or appoint (*g*); and in default of such direction or appointment, or so far as the same, if incomplete, shall not extend, IN TRUST for such person or persons as would have been entitled, by

and in default of appointment, in trust for their next of kin.

(*f*) It will be observed, that the daughters have not a power of selection in favour of the issue, as in the precedent next but one.

Remarks as to the modifications of daughters' shares.

(*g*) Where a testator divides his personal property amongst his children in equal proportions, but subjects the shares of daughters wholly or in part to trusts for their separate use for life, and afterwards for their children, he intends not to create an inequality between his male and female children, but merely to apply to the daughters' interests modifications adapted to actual or possible coverture. Hence, it should seem, that the ownership or disposing power of the daughters ought not to be interfered with or curtailed further than this purpose requires. In default of children, therefore, each daughter should take an absolute interest in her share, or, at least, should have a general power of disposition over it. The precedent in the text confers a general *testamentary* power; a species of power which has this peculiarity, that, while it gives the donee the amplest control over the future destination of the property, it excludes the possibility of its being exercised for her own personal advantage. Such a power falls far short, therefore, of placing the daughters on a parity of footing with sons, who are made absolute owners of their shares, though it is well adapted to effect the purpose, generally a very favourite one, of causing the property to be retained in the family; for, unless the daughter should leave a surviving husband, it is rather to be expected that she will exercise her testamentary power in favour of her brothers and sisters, or their children.

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virtue of the Statutes of Distribution, to such last-mentioned moiety of her said portion or share of the said residuary trust moneys, funds, and premises, if such daughter of mine had been absolutely entitled thereto, and had died intestate, and without leaving a husband or child; it being my intention that the husband, if any, of such daughter, and any child or children whom such daughter may leave surviving her, and who may afterwards die without acquiring a vested interest under the aforesaid trust in favour of children, shall be excluded (*h*) from taking any interest under the trust lastly hereinbefore contained. And my will is, that if any of my daughters (including the said [*illegitimate daughter*]), shall die leaving issue, who, being a son or sons, shall be under the age of twenty-one years, or, being a daughter or daughters, shall be under that age and unmarried, then, and in such case, the dividends or interest and annual produce of the presumptive share or shares of such issue in the said trust moneys and premises, or an adequate part thereof, shall, during his or their minority or minorities, or her or their minority and discoverture or minorities and discovertures, respectively, be applied for his, her, or their maintenance and education, and the residue thereof, if any, shall be accumulated, in the manner and for the purposes hereinbefore expressed concerning the dividends or interest and annual produce of the presumptive portion or portions of or in the said residuary trust moneys and premises of any of my children, who, being a son or sons, shall be under the age of twenty-five years and unmarried, or, being a daughter or daughters, shall be under the age of twenty-one years and unmarried at the time of my death, until they shall respectively become absolutely entitled thereto; and which last-mentioned accumulations shall follow in like manner the principal fund, but with the same liability to be applied for subsequent maintenance and education as aforesaid. And my will is, and I hereby declare, that the receipts of my trustees and trustee for the time being shall be good and effectual discharges for all or any of the moneys which they or he shall from time to time receive under the trusts of this my will, whether the same shall arise from the sale of the real estate hereinbefore devised, or from

Power to apply the interest of the shares of the issue of daughters in maintenance;

and to accumulate the residue of such interest, as before directed.

Receipts of trustees to be discharges.

(*h*) *Vide ante*, p. 340.

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altering or transposing all or any of the stocks, funds, or securities to be acquired under the trusts of this my will, or otherwise howsoever; and the person or persons paying or transferring all or any of the said trust moneys, stocks, funds, or securities, shall not be bound to look to the application of the moneys, stocks, funds, or securities, which, in such receipt or receipts, shall be acknowledged to be received, or be answerable for the loss, misapplication, or nonapplication of the same or any part thereof. AND I FURTHER DIRECT AND DECLARE, that in case the trustees or trustee for the time being of this my will shall deem it disadvantageous or inexpedient to proceed to sell and convert the real and personal estate hereinbefore devised and bequeathed immediately on my decease, it shall be lawful for the said trustees or trustee to postpone and delay such sale and conversion so long as they or he shall think proper; but this present power of suspending the sale and conversion shall not, in regard to the said real estate, prevent it from being impressed with the character or quality of personal estate immediately at my decease. And I further declare, that the income arising from such part of the said real and personal estate as from time to time shall remain unsold and unconverted, shall, from the day of my decease, go and be applicable to the same person or persons, and for the same purposes in all respects, as the income arising from the stocks, funds, and securities to be purchased with the proceeds of such sale and conversion would go and be applicable under the trusts hereinbefore contained. And I further direct and declare, that if, by reason of such suspension or delay as aforesaid in the exercise of the trust for sale and conversion hereinbefore contained, it shall be found to be inconvenient to pay and discharge any one or more of the legacies hereinbefore bequeathed, when and as soon as they become due and payable, (other than and except the legacy of £—— given to my said wife, which is to be paid immediately and at all events), then, and in such case, I empower my executors and trustees for the time being to postpone the payment of such legacy or legacies respectively (other than and except as aforesaid), for such period or periods not exceeding —— years from the time of my decease, as my said executors and trustees shall think proper, they paying from time to time, half-yearly, to the person or persons whose legacy or legacies re-

Power to trustees to suspend sale,

and postpone the payment of legacies.

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spectively shall be so postponed, interest thereon at the rate of 4*l.* per centum per annum during the period of such postponement. And I empower my executors and trustees for the time being, in their discretion, to compound for any sum or sums of money owing to me, and generally to give such indulgences to the debtors of my estate as they shall think proper; and also, if deemed expedient, to pay any debts owing or claimed to be owing by me, upon such evidence, whether strictly legal or not, as the said executors or trustees shall deem satisfactory; and also to adjust and wind up any accounts pending between me and any other person or persons, and give full and complete acquittances and discharges in relation thereto, and also to refer to arbitration any disputes which may arise with any person or persons with whom I in my lifetime, or the said executors or trustees after my decease, shall have had any dealings or transactions. And I further empower the said executors and trustees for the time being to sell any part of my residuary personal estate which shall be saleable under the trust hereinbefore contained, upon credit. And I give and devise to the said [*trustees*], and their heirs, the freehold and copyhold estates whereof I am seised as mortgagee or trustee, *To hold* the same unto and to the use of the said [*trustees*], and their heirs, for ever, or for all my estate and interest therein, subject to the equities, upon the trusts, and for the intents and purposes, for the time being affecting the same estates respectively; nevertheless, as to any beneficial interest belonging to me in such mortgaged estates, upon the trusts and for the purposes of this my will. And I nominate and appoint my said wife and the said [*trustees*], and the survivors and survivor of them, the guardians and guardian of the persons and estates of each son of mine during his minority and each daughter of mine (including the said [*illegitimate daughter*] (*i*),) during her minority and discoverture. [*Add clauses for changing and indemnifying trustees*]. In witness, &c.

Power to compound debts, &c.,

and refer to arbitration.

Devise of estates vested in testator as mortgagee or trustee.

Appointment of guardians for children.

As to appointment of guardians to illegitimate children.

(*i*) With respect to the illegitimate child, this appointment of guardians will be invalid, as the testator does not stand in a recognised parental relation to her. The nomination, however, is not without use, as the Court of Chancery appoints to the guardianship persons nominated by a putative father, without any reference to the Master. *Ward* v. *St. Paul*, 2 B. C. C. 583; *Peckham* v. *Peckham*, 2 Cox, 46.

WILL *in Favor of* WIFE *and* CHILDREN *of Testator.* HOUSEHOLD EFFECTS *to* WIFE ABSOLUTELY. ANNUITY *to Wife* DURING WIDOWHOOD. APPROPRIATION *of* FUNDS *to* ANSWER ANNUITIES. GENERAL RESIDUE *(subject to a* POWER *of* SELECTION *reserved to the* WIDOW *over* 1000*l. part thereof) to Trustees, In* TRUST *for Testator's* CHILDREN *and the* ISSUE *of any dying in his* LIFETIME *or afterwards,* BEFORE *the* VESTING AGE. *Special* TRUSTS *as to Shares of* CHILDREN MARRYING *in Testator's Lifetime* WITHOUT *his previous or subsequent* CONSENT, *or after his Decease without Consent of Guardians or Trustees, disposing of the Shares of such* SONS *to their* WIDOWS *and* CHILDREN *respectively; and in Default of such Objects, to the* OTHER CHILDREN *of Testator and their* ISSUE, *per Stirpes. Corresponding Restrictions as to Shares of* DAUGHTERS *so* MARRYING; *creating Trusts for their* SEPARATE USE *and for their* CHILDREN, *if any, with certain* POWERS *of* APPOINTMENT. ILLEGITIMATE CHILDREN *of Testator and his Wife (being born after a Marriage supposed to be invalid) declared to be entitled to* PARTICIPATE *in the* GIFTS *to* CHILDREN. DEVISE *of* FREEHOLDS *and* LEASEHOLDS *upon* TRUST *for* SALE. POWER *of* SALE *of* COPYHOLDS. PROCEEDS *arising from the Sale of* FREEHOLDS, LEASEHOLDS, *and* COPYHOLDS, *to fall into* GENERAL RESIDUE. USUAL DISCRETIONARY POWERS *to* TRUSTEES *as to* DEBTS *and* CREDITS; *also to* LEASE, VARY SECURITIES, &c. INDEMNITIES *to and* POWER *of* CHANGING TRUSTEES.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

I, [*testator*], of &c., do make this my last will and testament. I DIRECT that all my just debts and funeral and testa- Direction to pay debts.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

mentary expenses shall be paid and satisfied as soon as conveniently may be after my decease. I GIVE AND BEQUEATH unto my wife [*name*], all the household goods and furniture and other household effects, wines and other consumable stores, of which I shall be possessed at the time of my decease. ALSO I GIVE unto my said wife the sum of £——, to be paid or payable to or receivable by her upon or immediately after my decease. I GIVE unto my father-in-law [*name*], the sum of £——. I GIVE unto my brother [*name*], the sum of £——. I GIVE unto my brother-in law [*name*], and my friend [*name*], of &c., (my trustees and executors hereinafter named), the sum of 19*l.* 19*s.* (*a*) each, in consideration of the trouble they will have in executing the trusts of this my will. AND I hereby direct that the legacies hereinbefore given to the said [*father-in-law*], [*brother*], and [*trustees*], shall be paid respectively at the end of three calendar months from my decease, and that the legacy duty payable on the legacies given to the said [*father-in-law*] and [*brother*], and all incidental charges and expenses, shall be paid and defrayed out of my residuary personal estate. AND AS TO, FOR, AND CONCERNING all the residue and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may be or consist, of which I shall or may be possessed at the time of my decease, or over which I now have a general power of appointment or disposition by will, (excepting my leasehold estates hereinafter bequeathed), I give, bequeath, and appoint the same and every part thereof respectively unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST that they or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, do and shall with all convenient speed after my decease, possess, collect, and get in any moneys which may be due or owing to my estate, with full powers for the said trustees or trustee in their or his discretion to refer to arbitration, or arbitration and umpirage, any dispute concerning any debts or credits owing by or belonging to, or claimed to be owing by or belonging to my estate; and also to compound for any moneys

Bequest of household effects.

Pecuniary legacies.

Legacies to be free from legacy duty.

Residuary bequest to trustees.

Upon trust to collect and get in credits.

Powers to trustees to compound for debts, &c.

(*a*) Legacies under 20*l.* are not subject to legacy duty.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

due or owing to my estate, upon such terms and in such manner as the said trustees or trustee shall think proper, and to give or allow time for the payment of any moneys owing to my estate, without being answerable for any loss in respect thereof, and to pay any debt or debts claimed to be owing by me, notwithstanding the want or defect of strict legal evidence in support thereof, and likewise to sell and convert into money all other my residuary personal estate, except such part thereof as my trustees shall deem it expedient to continue on the security or securities on which the same shall happen to be invested, which they are hereby authorized to do, whatever may happen to be the nature of such security; and, upon further trust, that the said trustees and trustee do and shall place out and invest the moneys arising from my said residuary personal estate in their or his own names or name, in or upon any of the public stocks or funds (not being a sinking or temporary fund), or on government or real securities of or in Great Britain. And I direct and declare, that my trustees or trustee for the time being do and shall stand possessed of, as well the stocks, funds, and securities, to be purchased as lastly hereinbefore mentioned, as also the stocks, funds, and securities of which my residuary personal estate may happen to be composed at my decease, and which shall from time to time remain unsold and unconverted, upon the trusts following (that is to say), UPON TRUST to appropriate and set apart (*b*) so much of the said

Trusts concerning the proceeds of residuary estate,

Upon trust to appropriate fund for payment of annuity.

(*b*) Where a testator directs a fund to be appropriated to the payment of an annuity, it should be made distinctly apparent whether the legatee is to be entitled to his annuity out of the capital, if the income of the fund should become insufficient to answer it, or his claim is to be restricted to such income. Many questions of this nature arose on the successive reductions of the Navy Five Pounds per centum and the Four Pounds per centum, to annuities of a lower denomination. The more convenient course certainly is, to give the annuitant the entire income of the fund, which, at the time of the appropriation, produced the annuity (as in the text), regardless of subsequent fluctuations, as it would be troublesome to pay over to the residuary legatees, or accumulate for them, any trifling excess, and still more so, from time to time to sell small portions of the capital to make up any deficiency in the income to answer the annuity. Perhaps, indeed, it may be thought, that this plan

Remarks upon the appropriation of fund for annuity.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

stocks, funds, and securities, as shall, at the time of such appropriation, yield and produce the clear and full annual

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places too much discretionary power in the hands of the trustees, who might select a security (for instance a mortgage) yielding a rate of interest higher than could ordinarily be obtained, and thereby expose the annuitant to a probable diminution of income when the security is changed. The Three per cents are in little danger of being in this predicament, and therefore seem to offer the most eligible species of investment for an annuitant, whom a testator is especially anxious to guard against the possibility of loss. The trust in the text should then be varied as follows:

Clause authorising trustees to appropriate 3 per cent. Consols or 3 per cent. Reduced to answer annuities;

"UPON TRUST to appropriate and set apart or purchase in the names or name of the said trustees or trustee, such a sum or share of Three Pounds per centum Consolidated Annuities, or Three Pounds per centum Reduced Annuities, or such several sums or shares of both these annuities*, as shall be sufficient to answer and pay the annual sum of £——, and from time to time to pay unto or otherwise permit and suffer my said wife," &c.

Where it is desired not to circumscribe the power of investment within such narrow limits, and yet to secure the annuitant against being compelled to accept of a security not approved by herself, and at the same time to prevent the trustees from being embarrassed by her refusal to signify her consent, if made absolutely requisite—a case which sometimes occurs—these several objects may be attained by providing alternatively that the appropriated fund shall consist either of Three per cent. stock, *or, in the discretion of the trustees, of such other securities as the annuitant shall consent to accept.* The variation would then be as follows:

or, with consent of annuitant, other government or real securities.

"UPON TRUST to appropriate and set apart or purchase, in the names or name of the said trustees or trustee, such a sum or share of Three Pounds per centum Consolidated Annuities, or Three Pounds per centum Reduced Annuities, or such several sums or shares of both these annuities, as shall be sufficient to answer and pay the annual sum of £——, or, with the consent in writing of my said wife, invest such a sum of money in any other of the public stocks or funds of Great Britain, or on any real security in England or Wales, as

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* By purchasing an equal amount of each stock the annuity would be made to accrue quarterly.

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sum of £——, and to pay unto or otherwise authorize and empower my said wife or her assigns to receive and take the interest, dividends, and annual produce of such appropriated fund, for and during such time and so long as she shall continue my widow. And I direct, that, until such appropriation as aforesaid shall be made, the said annuity of £—— shall be paid out of my general residuary estate in equal half-yearly portions, the first half-yearly payment thereof to be made at the expiration of six calendar months next after my decease. And I declare that my said wife shall be entitled to a proportional part of the same annuity, or of the income of the said appropriated fund (as the case may be), up to and including the day of her second marriage or death, whichever shall first happen. And I DECLARE that the provision hereby made for my said wife shall be in lieu and full satisfaction of all dower, thirds, and freebench, which at common law, or by the custom of any manor or otherwise, she my said wife can, shall, or may, or otherwise might claim or be entitled to have, in, from, or out of any of the lands, tenements, or hereditaments of which I have been, or now am, or shall at any time hereafter be, seised for any estate of inheritance, or to which freebench is incident; and that she my said wife shall, if requested, at the costs of the person requiring the same (*c*), release the same lands, tenements, and hereditaments, and my trustees in respect thereof, from all right and title thereto. And I DIRECT that, subject to the payment of the aforesaid yearly sum of £—— to my said wife, the funds to be appropriated for the payment of the same annuities shall fall into and become part of my residuary trust moneys and securities hereinafter disposed of. And AS TO the sum of £—— sterling, part of the said trust moneys, and the funds and securities on which such sum shall be invested, IN TRUST for all and every or such one or more, in exclusion of the other or others of my children or

Provision for wife to be in satisfaction of dower.

Subject to annuities, the appropriated funds to fall into the residue.

Legacy of £—— out of residuary estate, in trust for such of the testator's children or more

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shall be sufficient, at the time of such appropriation, purchase, or investment, to answer and pay the said annuity, and from time to time to pay unto," &c.

(*c*) When a conveyance is to be executed, it should be always stated at whose costs it is to be done; in general, convenience is rather promoted by throwing this expense on the person who is to prepare the assurance.

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more remote issue, and in such shares and proportions, and to vest and be paid at such age or ages, and in such manner, and subject to such powers, conditions, and restrictions, as my said wife, whether covert or sole, by her last will in writing, or any codicil thereto, or any testamentary writing, shall appoint. And in default of any such appointment, or so far as the same, if incomplete, shall not extend, then, as to the same sum of £——, or any part thereof to which such incomplete appointment shall not extend, upon the same trusts and to and for the same intents and purposes as are hereinafter declared or referred to concerning the residue of the said trust moneys and securities. And as to all the residue of my said personal estate, and the stocks, funds, and securities whereon the same for the time being shall happen to be invested, and also as to the funds to be appropriated and set apart to answer the said several annuities of £—— and £—— to my said wife, when and as the same shall respectively determine or fail to take effect, In trust for all and every or such one or more of the children of me the said [*testator*] as at the time of my decease shall have attained the age of twenty-four years or been married, or as shall afterwards live to attain the age of twenty-four years or marry under that age, and the issue of such of my children as shall die in my lifetime leaving issue who shall survive me and attain the age of twenty-four years or marry, which shall first happen, as tenants in common, such issue of each child nevertheless only taking between or among them, and as tenants in common, the part or share which his or her respective parent would have taken or been entitled to if he or she had lived to gain a vested interest therein, and if there should be but one such child or issue, then the whole to that one child or issue. Provided always, and I hereby declare and direct, that, if any son of mine should during my lifetime or after my decease marry under the age of twenty-four years, without my consent, or without the consent in writing of his guardians or guardian, if such son should be under the age of twenty-one years, or if he should have attained the age of twenty-one years, then of my trustees or trustee for the time being, or of the majority of such guardians or trustees, if more than one, or should fail to obtain my consent or sanction during my life, or after my decease should fail to obtain the consent or sanction in writing of such

remote issue, as the wife shall by will appoint.

In default of appointment, to fall into the residue.

Residue in trust for testator's children and issue attaining twenty-four, or marrying, per stirpes.

In case of any son marrying under twenty-four, without consent, share not to vest absolutely on marriage;

guardian or trustee, or of the major part of such guardians or trustees, if more than one, to such marriage, within the space of two years next after the same marriage shall have taken place, as the case may require (*d*), then, and in every such case, his said portion or share, as well original as accruing or surviving, of and in the said trust moneys and securities shall not vest in such son absolutely, but, in lieu thereof, my trustees or trustee for the time being shall pay and apply unto or for him such part or parts of the interest and dividends of his said portion or share as my said trustees or trustee for the time being shall deem proper, until such son of mine shall attain the age of twenty-four years, at which time I will and direct that the principal monies thereof, and the unapplied interest and dividends, shall vest in him, and be paid and transferred accordingly; but, in case such son should die under the age of twenty-four years, leaving a widow and one or more child or children him surviving, or leaving one or more such child or children only, then I will and direct that his said part or share of and in the said trust moneys and securities, or so much thereof as shall not have been applied under the power hereinafter contained, shall be and remain upon and for the several trusts, intents, and purposes following (that is to say), in case such son should leave a widow and also one or more child or children as aforesaid, IN TRUST as to one moiety or half part of the interest and dividends thereof, for such widow for and during her natural life, to be paid and payable at such times and in such manner, and subject to such powers, conditions, and restrictions, as such son, by his last will and testament, or any testamentary writing, shall appoint; and, in default of such appointment, or so far as the same, if incomplete, shall not extend, UPON TRUST to pay unto or otherwise permit, authorize, and empower such widow to receive the same interest and dividends when and as they shall from time to time become due and payable or be received or receivable for and during the term of her natural life, unless such son, by his last will, or any testamentary writing, shall declare

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but son to take the interest only until twenty-four.

In case of his death under twenty-four, leaving a widow and children,

In trust as to one moiety for widow during life, as son by will shall direct; and in default,

Upon trust to pay interest to widow for life,

(*d*) Unless it is expressly so provided, *subsequent* approbation will not satisfy a condition requiring marriage to take place with consent, which ordinarily is construed to mean *previous* consent. As to the doctrine respecting marriage conditions in general, *vide* 2 Jarm. on Devises, 282.

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the contrary. And as to the said part or share of such son of and in the said trust moneys and securities (subject to the interest of the widow of such son in the interest and dividends of any part thereof, if there should be any such widow, and she should become entitled thereto as aforesaid), In trust for all and every or such one or more of the children of such son so dying, in such shares and proportions, and to vest and be paid at such ages or times, and in such manner, and subject to such powers, conditions, and restrictions, as such son, by his last will and testament, or any testamentary writing, shall appoint; and, in default of such appointment, or so far as the same, if incomplete, shall not extend, In trust for all and every or such one or more of the children of such son so dying as aforesaid as shall live to attain the age of twenty-one years, or to be married, whichever shall first happen, equally to be divided between or among them, if more than one, share and share alike; and if there should be but one such child, then the whole shall be In trust for such only child; but, in case such son so marrying without such consent, or failing to obtain such sanction as aforesaid, should die under the age of twenty-four years, leaving a widow only, and not leaving any child him surviving who shall live to attain the age of twenty-one years or to be married, then I will and direct that one moiety or equal half part of the part or share of such last-mentioned son of and in the said trust moneys and securities, shall be In trust for such person or persons, in such shares and proportions, and for such interest or interests, and in such manner, and subject to such powers, conditions, and restrictions as such son, by his last will and testament, or any testamentary writing, shall direct or appoint; and in default of any such appointment, or so far as the same, if incomplete, shall not extend, In trust for the widow of such son, her executors, administrators, or assigns; and the remaining moiety or half part of the part or share, as well original as accruing, of such son so dying of and in the said trust moneys and securities, or in case such son shall happen to die without leaving any widow or child surviving, then the entirety or whole of his said part or share, as well original as accruing, of and in the said trust moneys and securities shall sink into and become part of my residuary personal estate and effects for the benefit of the others or other of my chil-

subject thereto, as to the entire share, in trust for the children of son, as he by will shall direct, and in default of appointment, for children equally.

In case of son dying under twenty-four, leaving a widow only, then one moiety as he by will shall appoint; and in default of appointment,

In trust for the widow of son absolutely, the remaining moiety to go to the surviving or other children.

dren, or their, his, or her issue or appointees, to be held upon and subject to the trusts and purposes herein expressed concerning the original share or shares of such other children and issue respectively of and in the said trust moneys and securities. PROVIDED ALWAYS, and I hereby will and direct, that, if any or either of my daughters should, in my lifetime or after my decease, marry under the age of twenty-four years, without my consent, or without the consent in writing of her guardians or guardian for the time being if such daughter should be under the age of twenty-one years, or, if she should have attained the age of twenty-one years, then of my trustees or trustee for the time being, or of the majority of such guardians or trustees, if more than one, or should fail to obtain my consent or sanction during my life, or after my decease should fail to obtain the consent or sanction in writing of such guardian or trustee, or of the major part of such guardians or trustees (if more than one), to such marriage, within the space of two years next after the same marriage shall have taken place, as the case may require, then and in such case the portion or share of every such daughter, as well original as accruing or surviving, of and in the said trust moneys and securities, shall not vest in her absolutely, but, in lieu thereof, my trustees or trustee for the time being shall pay and apply unto or for her separate use, as hereinafter mentioned, the whole or such part or parts of the interest and dividends of her said portion or share as my said trustees or trustee for the time being shall deem proper, until such time as such daughter shall attain the age of twenty-four years, at which time my said trustees or trustee shall pay unto such daughter for her separate use, as hereinafter mentioned, the surplus (if any) unapplied of the said interest and dividends, and also shall and do thenceforth pay the whole of the said interest and dividends when and as the same shall from time to time become due and payable unto such daughter, for and during the joint natural lives of such daughter and her husband, for her sole and separate use and benefit as an inalienable provision, so far as the law will allow (*e*), for her own personal support during such

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In case of daughters marrying under twenty-four, without consent, &c., their shares not to vest absolutely on marriage,

but each such daughter to take the interest only during life for her separate and inalienable use.

(*e*) The validity of this restriction would, according to the recent doctrine, depend upon the fact of the daughter being under coverture at the testator's decease.

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coverture, and so as not to be in any way assigned or otherwise anticipated, and not to be subject or liable to the debts, control, intermeddling, or engagements of any husband whom such daughter shall be then married to, but to be applied and disposed of in such manner and to and for such intents and purposes in all respects as such daughter, notwithstanding coverture, shall from time to time as the same shall actually become due and payable, by any writing under her hand, order or appoint; and her receipts, notwithstanding coverture, or the receipts of the person or persons to whom she shall so appoint the same, shall be sufficient discharges for the same. AND in case the husband of such daughter should die in her lifetime, and she should then have attained or should afterwards attain the age of twenty-four years, then from and immediately after such decease of her husband or her attaining the age of twenty-four years (as the case may be), whether there be any child of such marriage or not, UPON TRUST to pay, assign, or transfer unto such daughter the principal or capital of her said portion or share of and in the said trust moneys and securities; but, if such daughter should depart this life without having attained the said age of twenty-four years, or if such daughter should happen to die in the lifetime of her husband, then I direct that, from and immediately after her decease, the said portion or share of such daughter shall be IN TRUST for all and every or such one or more of the children or more remote issue of such daughter, in such proportions, and to vest and be paid and payable at such age or ages or times, and in such manner and form, and under and subject to such powers, conditions, and restrictions as such daughter, whether sole or married, shall in and by her last will and testament in writing, or any testamentary writing (*f*), appoint; and in default of such last-mentioned appointment, or so far as the same, if incomplete, shall not extend, IN TRUST for all and every the child and children of such last-mentioned daughter who shall live to attain the age of twenty-one years, or marry under that age (whichever shall first happen), equally to be divided between or among them, if more than one, share and share

In case of such daughter surviving her husband, and attaining twenty-four, her share to vest absolutely;

but if such daughter should die under twenty-four, or in the lifetime of her husband, in trust for her children and more remote issue, as she by will shall appoint;

and in default of appointment, in trust for children attaining twenty-one or marrying; and in default of such children, then the share to sink into the residue, subject

(*f*) Here, it will be observed, the power of selection is confined to appointment *by will*, as to which, *vide* an observation *ante*, 481.

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alike; and if there should be but one such child, then the whole to be in trust for such only child; but if such daughter dying under the age of twenty-four years, or in the lifetime of her husband, as aforesaid, should have no child who should attain the age of twenty-one years or marry, then I will and direct that one moiety or equal half part of the said part or share of such daughter of and in the said trust moneys and securities, shall sink into and become part of my residuary personal estate and effects as hereinafter mentioned, and the other moiety or equal half part thereof shall be IN TRUST for such person or persons, in such parts, shares, and proportions, and for such interest or interests, and in such manner, and under and subject to such powers, conditions, and restrictions as such daughter, notwithstanding coverture, shall in and by her last will and testament in writing, or any testamentary writing, appoint; and in default of any such appointment, or so far as the same, if incomplete, shall not extend, the same moiety or equal half part, or so much thereof as shall not be completely appointed, shall sink into, and, together with the other moiety or equal half part thereof, become part of my residuary personal estate and effects, for the benefit of the other or others of my children, and their, his, or her issue or appointees, entitled to the other shares of my residuary estate, and be held upon and subject to the trusts and purposes herein expressed concerning the original share or shares of such other children and issue respectively of and in the said trust moneys and securities. PROVIDED ALWAYS, and I hereby further direct, that, in the meantime, and until the share or shares of my children or more remote issue respectively shall become vested and transferable, the interest or dividends, and, if deemed necessary, but not otherwise, any part not exceeding one equal fourth part of the principal, of the presumptive or expectant share of each such child or issue respectively of and in the said trust moneys and securities, or so much thereof as shall by my trustee or trustees for the time being or the major part of them (if more than one) be deemed or considered as requisite or necessary, shall be applied by such trustees or trustee, or, in their or his discretion, by the respective guardians or guardian of such child, children, or issue (if there shall be any such, and if my trustees shall think proper to pay the same to such guar-

as to one moiety to a general power of testamentary appointment in the daughter.

Provisions for maintenance and advancement.

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dians or guardian, instead of themselves applying the same), for or towards the maintenance and education of such child, children, or issue respectively so entitled in expectancy; and the residue of such interest or dividends (if any) shall from time to time be laid out at interest, to accumulate for the benefit of the same child, children, or issue respectively, or other the person or persons who shall ultimately be entitled under the trusts of this my will to the principal from which such accumulation shall arise. PROVIDED NEVERTHELESS, and I hereby declare, that the said trustees shall not be bound to see to the application of any moneys paid to any guardian or guardians under the authority of the last-mentioned proviso, nor to inquire whether the objects of the aforesaid provision are entitled to be provided for and maintained by any other person or persons or out of any other funds whatsoever. PROVIDED ALWAYS, and I hereby further direct, that it shall be lawful for my trustees or trustee for the time being, or the major part of them (if more than one), with the consent of the guardians or guardian for the time being (if any), or the major part of them (if more than one), of my said children or issue respectively, or, if there should not be any guardian or guardians, and after my children shall have attained the age of twenty-one years, then of the proper authority of my trustees or trustee for the time being, to advance and apply any part or parts of the respective probable or presumptive portion or share, portions or shares, of such child or issue respectively of and in my said trust moneys or securities (not exceeding the sum of £—— for each such child or issue), for the putting or placing him or her as a clerk or apprentice in or to any profession, trade, or business, or otherwise for his, her, or their benefit or advancement in the world, and also to advance to such of my said children or issue as shall settle in business, with the consent or approbation of my trustees or trustee for the time being, and shall have attained the age of twenty-one years, the whole or any part or parts of such presumptive or expectant portion or share, portions or shares, although such child or children or issue respectively should not, at the time or respective times of advancing or applying the same for any or either of the purposes aforesaid, have acquired a vested interest or vested interests therein. PROVIDED ALSO, and I hereby declare and direct,

Advancements

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that, in case I should in my lifetime give, advance, or settle unto, for, or upon any of my children or grandchildren respectively any sum or sums of money or other property for the putting or placing him, her, or them in or to any profession, trade, or business, or for or towards his, her, or their marriage portion, or otherwise for or towards his, her, or their advancement in the world, and such sum or sums or other property should be entered in any of my books of account by way of debit, then such sum or sums of money, or the value of such property so to be advanced for, or received by, or given to, or settled upon any such children or grandchildren respectively, shall, if less than the portion or share, portions or shares, hereby given and provided for such children or grandchildren respectively, be accounted, deemed, and taken as and for part of such portion or share, portions or shares respectively, but if equal to or more than such portion or share, portions or shares respectively, then shall be deemed and taken as and for the whole of such portion or share, portions or shares respectively, unless I should, by writing under my hand, signify and declare the contrary. PROVIDED ALWAYS, and I hereby will and direct, that, if I should have no child or more remote issue who under the trusts herein contained shall live to acquire a vested interest in my said residuary personal estate and effects, and my said wife [*name*] should be living and unmarried at the time of the failure of such children or issue, or should be living at the time of my decease, which shall last happen, then the whole of my said residuary personal estate and effects, or so much thereof as shall not have been applied under any of the powers herein contained, shall be IN TRUST for my said wife, her executors, administrators, and assigns; but, if my said wife should be then dead or married, then the whole of my said residuary personal estate and effects or the unapplied part thereof shall be IN TRUST for my sister [*name*] of &c., her executors, administrators, and assigns. AND WHEREAS the marriage ceremony between me and my said wife was twice performed, namely, once in the parish church of ——, on the —— day of ——, and once in the parish church of ——, on the —— day of ——; AND WHEREAS the second of the said marriages was solemnized in consequence of some doubts having been raised re-

made by testator to his children or grandchildren in his lifetime to be deducted from their shares.

In default of children living to acquire a vested interest, in trust for testator's wife, if living and unmarried, and if not, then in trust for testator's sister.

Recital that two of testator's children are supposed to be illegitimate.

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specting the validity of our previous marriage, by reason of an irregularity in the licence in pursuance of which the same was solemnized. AND WHEREAS two of my children, namely, [*name*] and [*name*], were born in the interval between the performance of the said two marriage ceremonies: Now I hereby direct and declare that all the gifts, trusts, and legacies in this my will contained and declared unto and in favour of my children shall extend to and comprise the said [*two children*], although they may happen or prove, in contemplation of law, to be illegitimate by reason of the circumstances aforesaid, or from any other cause whatsoever (*g*), it being my intention that such gifts, trusts, and legacies shall have the same operation and effect, to all intents and purposes whatsoever, in regard to each and every child and reputed child of me and my said wife as the same would have had if the first marriage or intended marriage between us had been duly and regularly solemnized, any rule of construction to the contrary notwithstanding. I DEVISE, BEQUEATH, AND APPOINT all the freehold and leasehold messuages, lands, tenements, and hereditaments in which I have any devisable interest, or over which I have any disposing power (except such hereditaments as are vested in me as mortgagee or trustee) unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns respectively, UPON TRUST, either immediately after my decease, or at any time afterwards, as the said trustees or trustee shall deem expedient, to make sale and absolutely dispose of the said hereditaments and premises, either altogether or in one lot, or by parcels or in several lots, and either by public auction or private contract, or partly by public auction or partly by private contract, as the said trustees or trustee in their or his discretion shall think fit, and to convey and assure the same when sold, in such manner as the purchaser or purchasers thereof shall direct. AND I HEREBY WILL AND DIRECT that all and singular my copyhold messuages, lands, tenements, and hereditaments (except such of the said hereditaments as are vested in me as mortgagee or trustee) shall, so far as the nature of

Direction that they shall participate in the benefits given by the will to children.

Devise of freeholds and leaseholds to trustees, upon trust for sale.

Power to sell copyholds.

(*g*) As to devises and legacies to illegitimate children, *vide ante*, p. 191.

the tenure will permit, also be sold and disposed of according to the trusts and declarations hereinbefore contained concerning my said freehold and leasehold hereditaments hereby made saleable as aforesaid; and, for the more conveniently carrying into effect such my intention, I give and devise my said copyhold hereditaments to such uses, upon such trusts, and for such intents and purposes, as the said [*trustees*] (*h*),

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(*h*) The copyholds are devised in this manner, instead of being included in the devise of the freeholds, in order to enable the trustees to confer a title on purchasers, without the necessity of their (the trustees) being previously admitted. It seems to be the practice in framing clauses of this kind, to avoid giving the donees of the power of sale any estate, under an impression, as it should seem, that the necessity of their admittance would thereby be incurred; but this notion is unfounded; for it is too late to contend that a general power of appointment may not co-exist with an estate in fee in the donee of such power. (See *Ray* v. *Pung*, 5 Barn. & Ald. 561). Whatever is the destination of the property, in default of appointment, it is clear that a purchaser claiming under the power of appointment would be *in* immediately under the will, whether the estate in the meantime vested in the donees or the heir, and consequently no intermediate admittance is requisite to the purchaser's title. *King* v. *Lord of the Manor of Oundle*, 1 Adolph. & Ellis, 283; *S. C.* 3 Nev. & Man. 484. It is also clear, that the lord's right of seizure consequent on the failure of the devisee or heir (as the case may be) to claim admittance (as to which, *vide ante*, Vol. 8, p. 60) would, after the requisite preliminary proceedings, prevail equally against one or the other, so that no advantage seems to be gained by leaving the estate to descend to the heir, subject to the power, instead of vesting it in the donees, which is obviously the more convenient course.

Remarks upon the power of sale of the copyholds.

The case of *The King* v. *The Lord of the Manor of Oundle* was as follows:—R. Ragsdell, being tenant in fee of copyholds, surrendered them to such uses, upon such trusts, and for such ends, intents, and purposes, and subject to such powers, provisoes, declarations, and agreements, as T. Dawson, by any deed or deeds, should direct or appoint; and in default of and until such direction or appointment, to the use of T. Dawson, his heirs and assigns, for ever. The next day Dawson, in execution of the power vested in him by the surrender, executed a deed of appointment, by which he directed and appointed that the copyhold premises should remain to the use of T. Prudey in fee. The lord refused to admit Prudey, the appointee of Dawson, on the ground that Dawson had not been admitted and paid his fine. The Court, on an application for a mandamus, and after hearing a very full and able argument in support and in resistance of the lord's claim, held that no such intermediate

Case of *King* v. *Lord of the Manor of Oundle*.

Appointee entitled to be admitted without the admittance of the appointor.

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or the survivors or survivor of them, or the heirs of such survivor, or other the trustees or trustee for the time being of this my will, to be appointed under or by virtue of the power in that behalf hereinafter contained, shall, by any deed or deeds to be executed by them or him in the presence of and attested by one witness or more at any time or times and from time to time during the term or period of twenty-one years, computed from the day of my decease, direct or appoint; and in default of such direction or appointment, and subject to any such direction or appointment which shall not be a complete disposition of the inheritance in fee simple of the said copyhold hereditaments, or of my estate or interest therein, *To the use* of the said [*trustees*], their heirs and assigns, for ever, or for all my estate and in-

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admittance was necessary. Lord *Denman* said:—"The application to copyhold property of the general doctrine, that an appointee under a power takes by the instrument creating a power, and not under that by which the power is executed, was not disputed by the counsel for the defendant; nor was it denied that trustees with a mere power to sell were not compellable to come in as tenants, in conformity with *Beal* v. *Shepherd*, Cro. Jac. 199; *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400. But a distinction between those cases and the present was strongly insisted upon; for here, Dawson was not a mere trustee to sell, but was surrenderee in fee for his own benefit, until and unless he should make an appointment; that event might never have happened, and at any rate, without his being admitted, his interest could not be transferred to Prudey. But it appears to us that these premises may be correct without leading to the conclusion. The lord never is nor can be for one moment deprived of a tenant, for the estate must always be in some person. In the two cases above cited, of trustees to sell without an interest, the estate was not in abeyance till sale, but remained in the heir of the devisor, which heir the lord might have compelled to be admitted if the sale was not made in reasonable time; but, when such sale was made, the purchaser was entitled to be admitted under the surrender to the uses of the will, just as if he had been a devisee named in it. So, here, Ragsdell remains tenant to the lord until some person is admitted under his surrender. No doubt Dawson might have declined to execute any deed of appointment; and if he had declined, he could not, without admittance and surrender, have passed his interest to another; but, as he has chosen to execute a deed of appointment under the power, *his appointee*, the present applicant, *takes nothing from him, but becomes the surrenderee of Ragsdell, just as if he had been named in the surrender.*"

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terest therein: nevertheless, upon and subject to the same trusts, powers, and declarations as are hereinbefore expressed and contained concerning my freehold and leasehold hereditaments, so far as the different nature of the tenure will permit.

Authority to trustees to enter into special stipulations relative to title, and buy in at auctions, &c.

And I empower the trustees or trustee for the time being of this my will, in their or his discretion, in the exercise of the trust for sale and power of sale respectively hereinbefore contained, to make and enter into any special conditions and stipulations relative to the title of the freehold, leasehold, or copyhold premises offered for sale, and also to buy in the same premises or any part thereof at any auction or auctions, and resell the same at any future auction or by private contract, as aforesaid, without being liable to answer for any loss or diminution in price occasioned by such resale, and also to rescind or vary the terms of any contract for sale that shall have been entered into.

Declaration of trust of moneys arising from sales.

And I will and direct that my said trustees or trustee for the time being do and shall, by, with, and out of the money which shall arise by or from such sale or sales respectively, in the first place, deduct, retain, satisfy, and pay unto and for themselves and himself respectively, the costs, charges, and expenses of and attending the execution of the trusts hereby reposed in them and him, and the money which such trustees or trustee shall disburse or expend in or about any suit or suits at law or in equity for obtaining possession of the said premises or any of them, or carrying the said trusts into execution, and enforcing the performance of any contract or contracts to be entered into with any person or persons who shall agree to become the purchaser or purchasers of the said premises or any of them. And I direct that the residue or surplus of the moneys arising from such sale or sales shall from time to time sink into and form part of my residuary personal estate, and be held by my trustees or trustee for the time being upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore expressed concerning the same residuary personal estate.

Disposition of the rents and profits of freehold, leasehold, and copyhold estates until sale.

And I will and direct, that, in the meantime, until the freehold, leasehold, and copyhold hereditaments and premises hereinbefore made saleable shall be actually sold and conveyed or assigned under the trust and power respectively hereinbefore contained, the rents and profits arising there-

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

from shall be applied by my said trustees or trustee for the time being, in the first place, in paying the charges and expenses of keeping the same premises in good tenantable repair, and insuring the buildings therein comprised from loss or damage by fire, and any other charges and expenses which may arise in relation thereto, and the residue or surplus of the same rents and profits shall from the time of my decease go and be paid to the person or persons who would under the trusts aforesaid be entitled to the annual income arising from the monies to be produced by the sale of the said hereditaments or from the securities whereon the same ought to have been invested, if such sale had actually taken place. PROVIDED ALWAYS, and I will and direct, that, until the said freehold, leasehold, and copyhold hereditaments shall be sold under the trust and power respectively hereinbefore contained, the trustees or trustee for the time being acting in the execution of the trusts of this my will shall have power to lease the said hereditaments, or such part thereof respectively as for the time being shall remain unsold, for any term not exceeding twenty-one years, at such rent, and under and subject to such conditions, covenants, and stipulations, as the said trustees or trustee shall think proper, so that no fine be taken for granting the same, and so that in respect of the said copyhold hereditaments the lord's licence be obtained. PROVIDED ALWAYS, and I further declare and direct, that it shall be lawful for my trustees or trustee for the time being, at their or his discretion, from time to time to alter and vary all or any of the stocks, funds, or securities in or upon which all or any part of the said trust moneys shall or may be invested, and to call in or accept by voluntary payments and receive the moneys due upon such securities or security; and all the moneys so received again to place out and invest in or upon any of the public stocks or funds or other government securities of Great Britain and Ireland (not being a sinking or temporary fund), or on real securities in Great Britain or Ireland, in the names or name of my trustees or trustee for the time being, who shall stand possessed thereof upon and for the several trusts and purposes by this my will declared concerning the original trust moneys or securities, or such of them as shall be then subsisting or capable of taking effect.

Power to lease.

Power to vary securities.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

PROVIDED ALWAYS, and I direct and declare, that the person or persons who shall become the purchaser or purchasers of all or any part of the said freehold, leasehold, and copyhold premises, under the trust and power respectively hereinbefore contained, or who from time to time shall or may have all or any part of the said trust moneys in his, her, or their hands, or upon securities given or to be given by him, her, or them, or who shall pay the rents and profits of the said premises or any part thereof, shall not be obliged or required to see to the application or disposition of the same moneys or any part thereof after payment of the same to the person or persons who for the time being shall be the acting trustees or trustee of this my will, or be answerable or accountable for the misapplication or nonapplication of the same moneys or any part thereof by him or them; [and that all and every receipts and receipt which shall be given for the said trust moneys or any part thereof, or the interest, dividends, and income of the same or any part thereof, or the rents and profits of the said premises, by the acting trustees or trustee for the time being of this my will, shall be a good, effectual, and sufficient acquittance and discharge, or several good, effectual, and sufficient acquittances and discharges for all and every sums and sum of money which therein and thereby respectively shall be acknowledged or expressed to be or to have been received (*i*).] PROVIDED ALWAYS, and I declare and direct, that the trustees or trustee for the time being of this my will shall be charged and chargeable only for such moneys as they and he respectively shall actually receive by virtue of the trusts hereinbefore mentioned, notwithstanding his, her, or their giving or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and that the said trustees or trustee for the time being shall not be answerable or accountable for any banker or other person with whom or in whose hands any part of the said trust moneys shall or may be deposited or lodged for safe custody or otherwise in the execution of the trusts hereinbefore mentioned; and that he, she, they, or any of them, shall not be answerable or accountable for any misfortune, loss, or damage which may happen in the execution of

Power to trustees to give discharges to purchasers.

Indemnities to trustees.

(*i*) The clause within brackets may be properly omitted, being mere surplusage.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

the aforesaid trusts, or in relation thereto, except the same should happen by or through his, her, or their own wilful default respectively, and then and in that case each person respectively shall singly and alone be answerable for such loss or damage as shall arise from his own default; and also that it shall be lawful for the trustees or trustee for the time being of this my will, and his, her, and their respective heirs, executors, administrators, and assigns, and each and every of them, by and out of the moneys which shall come to his, her, or their respective hands by virtue of the trusts aforesaid, to deduct, retain, and reimburse to and for himself and themselves respectively, and to pay to and allow his, her, and their co-trustee and co-trustees respectively all costs, charges, and expenses which he, they, or any of them shall or may sustain or be put unto about the execution of the aforesaid trusts, or in relation thereunto (*k*). PROVIDED ALWAYS, and I hereby declare and direct, that, in case the said [*trustees*], or either of them, shall die in my lifetime, or shall at my decease renounce the trusts hereof, or be incapable of acting therein, or in case all, or any, or either of the trustees for the time being of this my will shall during the continuance of any of the aforesaid trusts go to reside beyond the seas, or die or desire to be discharged from the aforesaid trusts, or refuse or become incapable to act therein, or shall become bankrupt, or take the benefit of any act for the relief of insolvent debtors, then, and so often as the same shall happen, it shall be lawful for the surviving or continuing trustees or trustee for the time being, if any, or in case of there being no such trustee, then for the retiring or renouncing trustee, or in case no person should be found to answer the description, or willing to act in this behalf, then for the executors or administrators of the last deceased trustee, by any deed or deeds, to be sealed and delivered in the presence of and attested by one or more witness or witnesses, from time to time to nominate and appoint some other fit person or persons to be a trustee or trustees for the purposes aforesaid, or any or either of them, in the place or stead of the trustee or trustees so dying, renouncing, going to reside beyond seas, or dying or desiring to be discharged, or refusing or becoming incapable to act, or becoming bankrupt or insolvent as aforesaid; and that

Power to appoint new trustees.

(*k*) As to the real effect of these clauses, *vide ante*, Vol. 8, p. 361.

immediately after every such nomination and appointment, the said hereditaments and premises, and also the said trust moneys, and the securities on which the same shall be then invested, or such of them as shall be subject to the trusts of this my will, shall be conveyed, assigned, or transferred, at the expense of my trust estate, in such manner that the same may be and become effectually vested in the surviving or continuing trustees (*l*) or trustee, and such new trustee or trustees as aforesaid, or else in such new trustee or trustees wholly, as the case may require, his, her, or their heirs, executors, administrators, and assigns respectively, upon and for such of the trusts and purposes, and with, under, and subject to such of the powers, provisoes, declarations, and directions hereinbefore expressed and declared concerning the same, as shall be then subsisting or capable of taking effect; and that every such new trustee shall and may, as well before as after the execution of such conveyance and transfer as aforesaid, act and assist in the management and execution of those trusts to which he shall be so appointed, as fully and effectually in all respects, and with the like powers and indemnifications as he might have done in case he had been originally in and by this my will appointed a trustee for the purposes aforesaid, or as if his name had been inserted in this my will in the place of the trustee in whose stead he shall be substituted. And I hereby nominate and appoint the said [*trustees*] to be executors in trust of this my will; and I nominate and appoint the said [*trustees*], and my said wife, and the survivors and survivor of them, guardians and guardian of the persons and estates of all my children (including the said [*two illegitimate children*] (*m*), during their respective minorities; but such guardianship to cease as to each or either of the guardians who shall go to reside abroad, or refuse or become incapable to act in the said guardianship. And I hereby revoke all former wills by me made, and declare this writing to be my last will and testament. In witness, &c.

WIFE AND CHILDREN, WITH SPECIAL RESTRICTED TRUSTS.

Appointment of executors and guardians.

Revocation of former wills.

(*l*) The term "surviving or continuing trustees," (in the plural), of course is only applicable when the trustees consist of more than two persons, or the power authorizes (which it rarely does) an augmentation of their number.

(*m*) *Vide ante*, p. 504, n.

ACCUMULATION AND REMOTE VESTING.

WILL *devising* REAL ESTATE *to* TRUSTEES, *Upon* TRUST *out of the Rents to pay* ANNUITIES *to Testator's* SONS *(to cease on Alienation), and to* ACCUMULATE RESIDUE *for* TWENTY-ONE YEARS, *and subject thereto during certain existing* LIVES, *and a further* ABSOLUTE TERM *of* TWENTY YEARS, *to* PERMIT *the* RENTS *to be received by the* PERSONS *for the time being who would be* ENTITLED *under* LIMITATIONS *to the Testator's* CHILDREN *and their Issue* SUCCESSIVELY *in* STRICT SETTLEMENT. *At the end of Lives and Twenty Years, Estates to be* CONVEYED *to the then* HEIR MALE *of Testator's Body; and if none, to the* HEIR GENERAL *of his* BODY *in* FEE; *and if none, to his then* HEIR GENERAL *in Fee.* PERSONALTY BEQUEATHED *to* TRUSTEES *to be* INVESTED *in the* PURCHASE *of* LANDS, *to be settled to the* USES *declared of Testator's* REAL ESTATES, *and in the meantime laid out in certain* SECURITIES (*a*). *Power to Trustees to* COMPLETE

Remarks upon the scheme for protracting the vesting.

(*a*) By this precedent, the vesting of the equitable inheritance is postponed to the extreme verge of the limits prescribed by the rule against perpetuities (*vide ante*, p. 37), except indeed that a term of twenty years is substituted for the term of twenty-one years, which that rule allows to be added to existing lives—a variation which has been made, not from any doubt of the testator's competence to have adopted the latter period, but for the mere sake of more obviously distinguishing the term in question from the term created for the purpose of restricting the accumulation of the income within the statutory limitation. (*Vide ante*, p. 65). It will be observed, that with a view to protract the vesting as long as possible, several classes of existing lives have been selected, comprising a sufficient number of individuals to insure to the testator a moral certainty of his scheme being carried on during the full ordinary period of human life, even before the adjunctive absolute term is entered upon. Supposing any one of the numerous per-

ALTERATIONS *in Testator's* MANSION-HOUSE, *and make Repairs and Improvements generally in his Estate; also to permit his eldest Son for the time being to occupy Mansion-house Rent free; also to* APPOINT BAILIFFS, RECEIVERS, &c. *Power of changing Trustees, and* IMPERATIVE DIRECTION *to* FILL *up* VACANCIES *in* TRUSTEESHIP. TRUSTEES *to be* BOUND *by Voice of* MAJORITY.

ACCUMULATION AND REMOTE VESTING.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. (*After bequeathing some pecuniary legacies to his daughters and trustees and others, and his household furniture, &c., the testator proceeds as follows:*)—I GIVE, DEVISE, AND DISPOSE OF, all my real estates whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy (other than the hereditaments vested in me as mortgagee or trustee), to [*five trustees*], of &c., *To hold* the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, or for any other my estate and interest therein, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same (that is to say), UPON TRUST from time to time, for and during the lives of all such of the children and more remote issue of me the said [*testator*] as shall be living at the time of my decease, and also of such of the children and more remote issue of my late father [*name*], de-

Devise of real estate to trustees in fee,

sons described to live for seventy years—a supposition by no means improbable when the juvenility of many of them is considered, the lives and absolute term make up an aggregate of nearly a century, during the whole of which period the vesting is necessarily suspended, on account of the uncertainty who will be the heir male or heir general of the body of the testator, or his heir general (as the case may be) at its expiration. But though the validity of such a disposition of property is unquestionable, and though it seemed proper to supply a precedent exhibiting a simple mode of accomplishing the intention, testators should not be encouraged by their professional advisers in these elaborate contrivances to push their restrictive limitations into a remote futurity. The present scheme has this most repulsive characteristic—that it inflicts the penalty of exclusion on every individual among the testator's descendants in whose favour personal knowledge might have been supposed to have created any feeling of tenderness or regard.

ACCUMULATION AND REMOTE VESTING.

Upon trust, during numerous lives and twenty years, to receive the rents.

ceased, as shall be living at my decease, and also of such of the children and more remote issue of the said [*trustees*] respectively as shall be living at my decease, and also of my said trustees themselves, and during the lives and life of the survivors and survivor of such several classes of children, issue, and trustees, and also for and during the further term or period of twenty years, to commence and be computed from the time of the decease of the survivor of the said children, issue, and trustees, to receive and take the rents and profits to arise from the said real estates hereinbefore devised. And as to, for, and concerning the rents and profits of the said real estates for and during the term of twenty-one years, computed from the time of my decease (*b*), to stand possessed of and apply the same, when and as the said rents and profits shall from time to time be received as aforesaid, upon the trusts and for the purposes following, that is to say, Upon trust, in the first place, to raise and pay thereout to each of my sons who shall be living at the time of my decease the annual sum of £——, during so much and so long of the said term of twenty-one years as such respective son shall happen to live, each such annuity to be payable quarterly, clear of legacy duty and every other deduction, with a proportional part thereof up to the period of the actual determination of the same annuity respectively, the first quarterly payment thereof to be made at the expiration of three calendar months from the day of my decease. And I declare, that the said annuities respectively shall be and constitute a personal and inalienable provision for my said sons respectively, and that in case the same annuities, or any part thereof respectively, shall be assigned, incumbered, or in any manner anticipated by my said sons respectively, or in case such annuities, or any part thereof respectively, shall, by operation of law or by any other means whatsoever, become payable to or receivable by any person or persons whomsoever other than my said sons respectively, such annuities or annuity respectively shall immediately thereupon cease and determine; and subject to the payment of the said annuities respectively, or after the determination thereof (as the case may be), Upon trust, from time to time, during the said term of twenty-one years, to lay out and invest the residue or surplus or the whole of the said

During twenty-one years from testator's decease to pay certain life annuities to his sons, to cease on alienation.

And invest surplus of rents in purchase of real estate,

(*b*) *Vide* stat. 39 & 40 Geo. 3, c. 98, stated *ante*, p. 65.

ACCUMULATION AND REMOTE VESTING.

rents and profits (as the case may be), in the purchase of freehold or copyhold lands or other hereditaments in England or Wales, held for an estate of inheritance in fee simple, to be conveyed and assured to the use of the trustees for the time being of this my will, their heirs and assigns, upon the trusts and for the intents and purposes in this my will expressed concerning the real estates hereby devised, or upon and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect. And I declare, that in the meantime, until the said moneys shall be so laid out, the same shall be from time to time invested by the said trustees for the time being, in their own names, in the Three Pounds per centum Consolidated Annuities, or in the Three Pounds per centum Reduced Annuities, or in Exchequer Bills, which funds and securities may be changed and varied as often as shall be deemed expedient, and the dividends and annual produce thereof shall from time to time be applied in such and the same manner as the said rents and profits are hereinbefore directed to be applied, so as to form an accumulating fund in the nature of compound interest. And as to, for, and concerning the rents and profits to arise from the said real estates hereinbefore devised, after the end or expiration of the said term of twenty-one years, Upon trust, from time to time during the lives of the said children, issue, and trustees, and the lives and life of the survivors and survivor of them, and also for and during the said term of twenty years commencing from the decease of such survivor as aforesaid, Upon trust, from time to time, to pay the rents and profits arising from the said real estates respectively, unto, or permit the same to be received and enjoyed by the person or persons who would for the time being be entitled thereto, if the said real estates stood actually limited to the uses following (that is to say), *To the use* of my eldest son [*name*], for and during the term of his natural life; and from and immediately after his decease, *To the use* of the first and every other son of the said [*eldest son*] lawfully begotten, successively, according to seniority, and the heirs male of the body of every such son, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his and their body and bodies; and for default of such

Until purchase moneys be laid out in securities.

At the expiration of twenty-one years, rents to be paid to persons who would be entitled under following limitations.

To the use of eldest son for life; remainder,

To his first and other sons successively in tail male; remainder,

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To second son for life; remainder,

To his first and other sons in tail male; remainder,

To each of testator's other sons for life; remainder,

To their first and other sons, in like manner.

To testator's daughters and their issue, in like manner.

At the end of term, trustees to convey to testator's heir lineal or collateral in fee.

issue, *To the use* of my second son [*second son*], for and during the term of his natural life, and from and after his decease, *To the use* of the first and every other son of the said [*second son*], successively, according to seniority, and the heirs male of the body of every such son, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his or their body or respective bodies; and for default of such issue, *To the use* of each of my other sons lawfully begotten during the term of his natural life; and after his decease, *To the use* of his first and every other son lawfully to be begotten, successively, according to seniority of age, in tail male, the elder of my said other sons, and his first and other sons successively in tail male, being always preferred to the younger of my said other sons and his and their first and other sons in tail male; and for default of such issue *(Add limitations to the testator's daughters and their issue successively in tail male in like manner, with remainder to the first and other sons of the testator's sons successively in tail general, with remainder to his first and other daughters successively in tail general, with remainder to the testator's own right heirs)*. And from and after the end or expiration of the said term or period of twenty years, commencing from the decease of the survivor of the several persons hereinbefore described or referred to as aforesaid, then I empower and direct the trustees for the time being of this my will forthwith to convey and assure all and singular the real estates hereinbefore devised, and also such real estates as shall have been purchased and acquired by the said trustees or trustee under or by virtue of the trusts and directions hereinbefore or hereinafter contained, *To the use* of the person who shall then answer to the description of heir male of my body, his heirs and assigns, for ever, and if there shall be no person answering to such description, then *To the use* of the person or persons who shall, at the end or expiration of the said term of twenty years, answer to the description of heir general of my body, his, her, or their heirs and assigns, for ever, if more than one, as tenants in common; and if there shall be no person answering to the last-mentioned description, then *To the use* of the person or persons who shall then answer to the description of my heir

general, his, her, or their heirs and assigns, for ever, if more than one, as tenants in common; and upon, to, or for no other trust, intent, or purpose whatsoever. *(Add full discretionary powers to lease and sell and exchange, and if any part of the real estate consists of an undivided share, to concur in partition, or of a manor, to enfranchise copyholds* (*c*). And as to all the residue and remainder of my money, securities for money, goods, chattels, personal estate and effects whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease, I give and bequeath the same and every part thereof respectively to the said [*trustees*], their executors and administrators, upon the trusts following (that is to say), Upon trust to sell and dispose thereof or otherwise convert, collect, and get in the same, and after payment and satisfaction thereout of the debts owing by me at the time of my decease, and also my funeral expenses, the charges and expenses attending the execution of the trusts of this my will, and the pecuniary legacies hereby bequeathed, Upon trust to lay out and invest the clear or net moneys arising therefrom in the purchase of freehold or copyhold lands or other hereditaments held for an estate of inheritance in fee simple, to be situate in England or Wales. And I direct and declare, that the hereditaments so to be purchased as aforesaid shall be conveyed and assured to the trustees for the time being of this my will, upon the trusts and for the intents and purposes in this my will expressed concerning the real estates hereby devised, or upon and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect; and in the meantime, until the said trust moneys shall be so laid out, the same shall be invested by the said trustees for the time being in the purchase of Three Pounds per centum Consolidated Annuities, or Three Pounds per centum Reduced Annuities, or Exchequer Bills (the same to be varied from time to time as often as the said trustees for the time being shall deem

ACCUMULATION AND REMOTE VESTING.

Bequest of residue of personalty to trustees, upon trust to invest same in purchase of lands to be settled to uses of will.

In the meantime the moneys to be invested on securities.

(*c*) Where there is a direction to purchase real estates, powers to make partition and enfranchise copyholds, though not applicable to any property belonging to the testator, may be properly introduced, with a view to the possibility of an undivided share or a manor being acquired under the power.

ACCUMULATION AND REMOTE VESTING.

expedient). And I direct and declare, that the dividends and annual produce arising from the said funds and securities shall go and be applied in such and the same manner in all respects as the rents and profits of the hereditaments to be purchased with the said trust moneys would have gone and been applicable, if the same had been actually purchased pursuant to the trusts aforesaid. And whereas I have begun to make considerable alterations and improvements in my mansion-house at ——, which may happen not to be completed at my decease (*d*), now in such case I hereby authorize and empower my trustees for the time being to carry on and complete the said alterations and improvements, or such part thereof as they shall think proper, out of the proceeds of my personal estate or any other moneys which shall come to their hands by virtue of this my will. And I further authorize and empower the said trustees from time to time to expend such sum or sums of money as they shall deem expedient in the repair and improvement of any of the messuages and other buildings, lands, and hereditaments hereby devised, and also of the messuages, buildings, lands, and hereditaments to be purchased by virtue of the trusts and powers aforesaid, and also in the erection of any new and additional messuages and other buildings on any such lands and hereditaments devised or to be purchased as aforesaid, and generally to make such expenditure and outlay in the improvement and amelioration of the trust estate during the continuance of the trusts hereby created, as the said trustees for the time being shall think proper and expedient (*e*). And I expressly declare, that in case my trustees for the time being shall find it impracticable or shall deem it inexpedient to let my messuage or mansion-house at ——, and the garden and

Authority to trustees to complete alterations in testator's mansion-house, and generally to improve his estate.

Authority to trustees to permit testator's son to reside in his mansion-house.

(*d*) This clause confers on the trustees a discretion in an event in which there would be an obvious inconvenience from their want of it. It often happens that trustees are obliged to resort to a Court of equity, in consequence of the testator having neglected to arm them with discretionary powers adapted to all possible circumstances.

(*e*) This clause gives great latitude of discretion; but where the vesting is long protracted, it is of course increasingly important that the trustees should have ample powers of management.

pleasure grounds thereto belonging during the said term of twenty-one years, commencing from my decease as aforesaid, it shall be lawful for such trustees, if they shall think proper, to permit my eldest or only son for the time being to reside in and occupy the said mansion-house, garden, grounds, and premises, during the whole or any part of the said term of twenty-one years, without paying any rent or other compensation for the same; such son nevertheless, during his residence as aforesaid, keeping the said premises in good order, repair, and condition, and paying all taxes and other outgoings in respect thereof, including the expense of keeping on foot a policy of insurance in the sum of £——, to be effected in the names of my trustees. *(Add power to trustees to compound for debts, and suspend or relinquish claims and demands, as in the former precedents).* PROVIDED ALSO, and I further authorize and empower the trustees for the time being of this my will, from time to time during the continuance of the trusts hereby created, in their absolute discretion to appoint, retain, and employ such bailiffs, stewards, receivers, clerks, or other persons to aid and assist them in the care and management of my said real estates, and in receiving and paying the rents, income, and produce thereof, or any part thereof, or otherwise in the performance and execution of the several trusts and purposes hereinbefore declared concerning my real or personal estate as to the said trustees for the time being may seem best, and also to pay or allow to all such agents, stewards, receivers, clerks, and other persons so appointed, retained, and employed from time to time, such salary or salaries, allowances, or other compensation as may or shall have been usually paid or allowed by me, or otherwise as the said trustees for the time being shall in their discretion think fit. *(Devise of estates vested in the testator as mortgagee or trustee, and appointment of executors).* PROVIDED ALWAYS, and I hereby declare, that when and so often as any of my said trustees hereinbefore named, or other the trustees to be appointed as hereinafter mentioned, shall, by the decease of any of them in my lifetime or after my decease, or by any of them renouncing or declining or becoming incapable to act or otherwise, be reduced below the number of five acting trustees before the accomplishment or performance of the

ACCUMULATION AND REMOTE VESTING.

Power to trustees to appoint bailiffs, &c.

Power of changing trustees, and imperative direction to supply vacancies in trusteeship.

ACCUMULATION AND REMOTE VESTING.

said several trusts and purposes hereinbefore declared, it shall be lawful for the survivors or survivor or others or other of the said trustees for the time being, and they and he are and is in every such case hereby directed and required forthwith to appoint one or more other fit person or persons to be a new trustee or trustees in the room of the trustee or trustees so dying or renouncing or declining to act, or otherwise ceasing to be an acting trustee of this my will, so that the full number of five acting trustees shall from time to time be kept up; and that when and so often as any new trustee or trustees shall be so appointed, all the aforesaid trust estates, funds, securities, and premises, real and personal, which may be then vested in the trustees or trustee for the time being shall be thereupon conveyed and assigned at the costs of my trust estate, so and in such manner as that the same may be or become vested in such new trustee or trustees jointly with the then surviving or continuing trustee or trustees, or in such new trustee or trustees solely, as the case may require, upon the trusts, for the purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore expressed concerning the same; and that all and every such new trustees or trustee shall and may in all things, as well before as after the execution of such conveyance and assignment as aforesaid, act and assist in the management, carrying on, and execution of the several trusts or any of them whereto they or he shall be so appointed, as fully and effectually and with all the same powers and indemnities, to all intents and purposes, as if he or they had been originally appointed a trustee or trustees thereof by this my will. And I hereby direct, that every new trustee so to be appointed as aforesaid shall have and receive out of the trust funds, moneys, and premises, the sum of £——, as some compensation for his trouble in the performance of the trusts aforesaid. AND I DIRECT AND DECLARE, that in case a difference of opinion shall exist among my trustees for the time being in regard to any of the trust affairs, or any act, matter, or thing proposed to be done in relation thereto, the opinion and determination of the majority of the same trustees shall or may be conclusive, it being my intention that the acts and proceedings of the major part in number of the said trustees shall for all the purposes of this my will be and

Trustees to be bound by the voice of the majority.

ACCUMULATION AND REMOTE VESTING.

Indemnities to trustees.

be deemed to be as the acts and proceedings of the whole or entire body of the same trustees, any rule of law or equity to the contrary notwithstanding (*f*). PROVIDED ALSO, and I further declare, that the trustees for the time being of this my will shall not be answerable or accountable the one for the others or other of them, or for the acts, deeds, defaults, receipts, payments, or disbursements of the others or other of them; or be charged or chargeable with or accountable for any further or other sum or sums of money or other trust property and effects than what shall actually come to the hands of and be received by them respectively, notwithstanding they or any or either of them shall give or join or concur in giving or signing any receipt or receipts for the sake of conformity; and that they or any or either of them shall not be answerable or accountable for the insufficiency, defect, or failure of any banker or other person in whose hands any part or parts of the aforesaid trust moneys or other property shall or may at any time or times hereafter happen to be by them or any or either of them placed or lodged for safe custody; or for any defect or insufficiency in the title or evidence of title to any estates or hereditaments which the said trustees shall or may purchase under or by virtue of the trusts, powers, and authorities hereinbefore contained, in case such title shall have been approved by counsel on their behalf, or for any loss or damage which shall or may happen or arise of or to all or any the aforesaid trust estates, moneys, effects, and premises, or the proceeds or produce thereof or any part thereof, provided the same shall happen without any wilful neglect or default on the part of such trustees respectively; and also that it shall be lawful for every trustee for the time being of this my will from time to time and at all times to retain to and reimburse himself respectively, and to allow to his co-trustees or co-trustee by and out of the said trust estate, moneys, and premises, or the income or proceeds thereof, all such loss, costs, charges, and expenses as they or any or either of them shall or may pay, sustain, expend, or be put unto by reason of the trusts hereby in them respectively reposed, or in the management or execution thereof or otherwise relative thereto.

(*f*) This seems to be a useful provision where the trustees are numerous.

ACCUMULATION AND REMOTE VESTING.

And I especially declare, that the said trustees for the time being shall be allowed their full costs as between attorney and client, and that every trustee who may happen to be of the profession of an attorney or solicitor shall be entitled to make the usual professional charges for business transacted and done for and on the behalf of my trust estate, any rule of equity to the contrary notwithstanding. And I hereby revoke all other wills by me at any time heretofore made, and declare this only to be my last will and testament. In witness, &c.

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WILL *of a* Solicitor *giving* (*inter alia*) *to* Wife Life Interest *in Testator's* Share *of a* Residue *under a Will, with* Power *of* Selection *over the* Capital *in favour of Testator's* Children *and more remote* Issue; *and in Default of Appointment, in Trust for* Children equally. *In the event of bequeathed* Share *being* received *in Testator's Lifetime, Bequest of equivalent* Sum *of* Money, *upon similar Trusts. Bequest of Testator's* Share *in* Law Books, Office Furniture, *and* Papers, *being Partnership Property, to his Son* (*Partner*). *Special* Devise *of an* Estate *vested in Testator as* Trustee *to the beneficial Owner. General Devise of* other Trust Estates. Pecuniary Legacy *to Trustees in Trust for a* married Woman *for Life, with Special Power to Trustees to* apply *Income for her Benefit in case of* Incapacity *to give Discharges, and also* Proviso *for* Cesser *on* Alienation; *and at her Decease, in Trust for Two of her* Children. Residuary Devise *and* Bequest *to* Trustees, *upon Trust for Sale and Conversion, and divide* Proceeds *among certain* existing Children *and* all after born Children *of Testator. Usual* Powers *to* Trustees *to apply* Income *and a Share of* Capital *to the* Main-

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TENANCE *and* ADVANCEMENT *of* MINORS; *also to* GIVE INDULGENCIES *to* DEBTORS, *to* REFER DISPUTES *to* ARBITRATION, *to* SUSPEND SALE *and* CONVERSION, *(with Special Provision where unsold* PROPERTY *consists of* REVERSIONS *or* LEASEHOLDS). DEVISE *of* ESTATES *vested in Testator as* MORTGAGEE. GENERAL POWER *of* CHANGING TRUSTEES. ONE MOIETY *of Daughters'* SHARES *to be* RETAINED *by Trustees, upon* TRUST *for* SEPARATE *and* INALIENABLE USE *of* DAUGHTERS *for Life, and at their Decease, for their respective* CHILDREN *and* ISSUE, *as* DAUGHTERS *respectively shall* APPOINT; *and in Default of Appointment, in Trust for* CHILDREN EQUALLY, *and in Default of Children, for Testator's* OTHER CHILDREN *and* ISSUE, *as* DAUGHTEES *respectively shall by* WILL APPOINT; *and in Default of* APPOINTMENT, *upon the* SAME TRUSTS *(with a certain exception) as the other* SHARES. *Power to* DAUGHTERS *to* BEQUEATH LIFE INTERESTS *to* HUSBANDS. *Special* PROVISO *for* CESSER *of* LIFE INTEREST *of* DAUGHTERS *who may be discovert, and shall* ASSIGN, *or shall* MARRY *without* SETTLING *Income to their* SEPARATE *and* INALIENABLE USE (*a*). *Power to*

As to validity of *future* trusts for separate use.

(*a*) Since the publication in the last volume (p. 362) of observations on the case of *Newton* v. *Reid*, the discussion respecting the validity and effect of trusts for separate use during future coverture has been revived in the case of *Massey* v. *Parker*, 2 Myl. & Keen, 174: a case which claims especial notice on account, and only on account, of its having been made, by the learned Judge who decided it, the vehicle for promulgating some new and important doctrine; so important, indeed, that the attention of the profession cannot be too earnestly drawn to it. The case was as follows:—

Case of *Massey* v. *Parker*.

E. W. made a will containing the following passages: "And, secondly, it is my will, that my two grand-daughters, Eliza and Rebecca Wadsworth, receive the full interest of all moneys not otherwise bequeathed that I may die in possession of; and it is my will, that the said interest be for and under the sole control of my said two grand-daughters, the aforesaid Eliza and Rebecca Wadsworth, the principal to be equally divided for the use of the surviving issue; *but if either**, and that Mary

* *Sic orig.*

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TRUSTEES *to* SETTLE *the other Moiety of the* SHARES *of* DAUGHTERS MARRYING UNDER AGE.

Wadsworth, their mother, shall have no control whatever over this their property; and at the demise of the said Eliza and Rebecca Wadsworth the principal to be equally divided for the use of their surviving issue." The grand-daughter, Eliza Wadsworth, was unmarried at the date of the will, and at the testator's decease. She afterwards married, and her husband took the benefit of the Insolvent Debtors' Act. On a bill filed by the husband's assignees against the executors, two questions were raised: 1st, Whether it was meant to create a trust for the separate use of the legatee; and 2ndly, Whether, if such were the intention of the testatrix, it was an intention to which the law would permit effect to be given. Sir *C. C. Pepys*, M. R., after remarking, that the cases required very distinct and unequivocal expressions to create a separate interest in the wife, proceeded to shew, that, in this instance, the words were insufficient, being used merely for the purpose of excluding the control of the legatees' mother, not their husbands.

So far the case decided nothing that was new, or especially deserving of attention, but merely that a life interest given to a woman in the peculiar terms of this will was not intended to be for her separate use, and consequently belonged to the assignee of the insolvent husband. The conclusion of the Master of the Rolls on this point exempted him from the necessity of entering upon the second and more general subject of consideration. The learned Judge, however, not availing himself of this exemption, proceeded to observe—"But the more important question is, whether the intention to give the income for the separate use of the grand-daughter Eliza, if sufficiently expressed, can, under the circumstances, have effect given to it, so as to deprive the husband of his ordinary right to the property? The objection is that, the legatee being unmarried at the time of the testatrix's death, the intended restriction was inconsistent with the nature of the interest given, and therefore inoperative. That an attempt so to fetter the interest of a male legatee cannot succeed was decided in *Brandon* v. *Robinson*, 18 Ves. 429, and that the same rule applies to an unmarried female legatee is established by *Woodmeston* v. *Walker*, 2 Russ. & Myl. 197, and *Brown* v. *Pocock*, 2 Russ. & Myl. 218. The only modern case apparently inconsistent with these decisions, is that of —— v. *Lyne*, 1 You. 562, and it is to be observed, that the judgment in that case proceeded altogether upon the supposed intention, without reference to the rule of law as established in the other cases. It has also been decided, that such fetters, though binding upon a married female legatee during her coverture, cease upon her becoming discovert. Such is the case of *Barton* v. *Briscoe*, Jac. 603.

Trusts for separate use held to be invalid as to future coverture.

Power to APPOINT NEW TRUSTEES *in regard to the* RESPECTIVE SHARES *of the* DAUGHTERS.

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It may, indeed, be said, that in that case the restriction was confined to the existing coverture; but, in *Jones* v. *Salter*, 2 Russ. & Myl. 208, a subsequent marriage was in terms provided against, and yet Sir *W. Grant* held, that after the death of the first husband the legatee had the absolute power over the fund. The only question, therefore, is whether, where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture. Why were they inoperative before her marriage? Because they were inconsistent with the nature of her estate. Her estate and interest were, therefore, absolute before marriage, and the trustee held the legacy for her absolutely. She might have taken it herself, or have given it to any one; and why may she not, by the act of marriage, give it to her husband? Upon principle, therefore, I should not have had any doubt of the right of the husband; but the very point was decided in *Newton* v. *Reid*, 4 Sim. 141, and that case was alluded to, without any expression of disapprobation, by the Lord Chancellor, in *Brown* v. *Pocock*. I must, therefore, consider the point as settled. Upon both points, therefore, I am of opinion, that Eliza's husband did obtain an interest in his wife's legacy."

Remarks on the case of *Massey* v. *Parker*.

It appears, then, that the Master of the Rolls is of opinion not only that a restriction imposed on the aliening power of a feme sole is void during her discoverture (which may be considered as a point completely settled by *Barton* v. *Briscoe* and that class of cases), but that, according to the more dubious doctrine of *Newton* v. *Reid*, *ante*, Vol. 9, p. 362, such a restriction expressly extending to future coverture, though not previously avoided by an act of alienation, is inoperative, and that a trust for separate use during future coverture shares the same fate, his Honour deeming the imposition of either of these restrictions as an attempt to engraft upon the interest of a feme sole a modification inconsistent with the nature of that interest.

Examination of opposing authorities.

Of the cases cited by the Master of the Rolls it is observable that not one goes the whole length of his doctrine, except *Newton* v. *Reid;* for *Woodmeston* v. *Walker*, *Brown* v. *Pocock*, and *Jones* v. *Salter*, only establish that a trust for separate and unalienable use during future coverture does not prevent the *cestui que trust* while sole from exercising her aliening power. But when his Honour proceeds to identify with this undeniable proposition, the doctrine that such prospective trusts are wholly void, *ab initio*, and that the husband, by the mere effect of the marriage alone, acquires an absolute interest in property so settled, he is encountered by

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POWER *to* TRUSTEES, *under the Advice of* COUNSEL, *to* DETERMINE QUESTIONS *of* CONSTRUCTION ARISING *on the* WILL (*b*).

notions long prevalent in the profession, supported by a series of decisions tacitly or expressly recognising their correctness.

Case of *Beable* v. *Dodd.*

Such a case is *Beable* v. *Dodd*, 1 Durn. & East, 193, where a testator devised lands to trustees in trust to pay the rents to his daughter A. for life, or to such person as she should appoint, notwithstanding her coverture, but not into her husband's hands, with a direction that such rents and profits should not be subject to any control or management of her husband, the same being designed for her separate use. The daughter's husband died in the lifetime of the testator, who subsequently made a codicil to his will, by which he confirmed the will in all particulars not altered by it. The question was, whether, under the will and codicil, the separate enjoyment of the rents was confined to the life of the first husband, or extended to a future husband, *to whom the daughter was married after the death of the testator;* and it was determined that, according to the true construction of the will and codicil taken together, the testator intended his daughter to enjoy the lands free from the control of any husband, present or future.

Jacobs v. *Amyatt.*

So, in the case of *Jacobs* v. *Amyatt*, 1 Madd. 376, n., Sir *R. P. Arden*, M.R. decreed a fund to be settled for the separate use of a female legatee, *who had married subsequently to the testator's decease;* and Lord *Thurlow*, on appeal, affirmed the decree*.

Adamson v. *Armitage.*

In *Adamson* v. *Armitage*, 19 Ves. 416, too, it is to be inferred that the object of the gift was discovert at the making of the will, and (which is more material) at the death of the testator, and yet Sir *William Grant* expressed an unhesitating opinion that the bequest for her *sole* use would have the effect of vesting the property in her exclusively of the marital claim.

In the preceding cases no suspicion seems to have been entertained of

(*b*) This precedent, it will be seen, contains, in addition to the usual clauses, some rather special provisions, and perhaps will be found on the whole the most useful in the present series. It is obvious that all the special circumstances which it supposes are not likely to occur in any one case.

* It seems allowable to cite this case for the present purpose without defending the construction put by the Court on the bequest, which certainly was very bare of expressions to raise a trust for separate use.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I appoint my friends [*executors*] of &c.

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Appointment of executors.

the validity of trusts for separate use extending to future coverture: the point was assumed; and therefore the adjudications afford a less decisive support to such a trust than the case about to be stated, in which two eminent equity judges successively, and one of them repeatedly, held a bequest for the separate use of a woman, who was unmarried at the death of the testator, to be valid, *in the teeth of the arguments by which such gifts are now attempted to be assailed.* The case here alluded to is *Anderson* v. *Anderson*, 2 Mylne & K. 427, where S. K., the testator, bequeathed to his daughter, D. K., two leasehold houses, to take the rents for her own sole use, free of control of any present husband or any husband to come. The testator died in 1808. In 1817 the daughter married; no settlement was made; it was even alleged that she had, by special contract pending the marriage treaty, relinquished the benefit of the trust for her separate use. The husband and wife afterwards separated, and the wife by her next friend filed a bill against the husband, praying that he might be decreed to assign the premises to a trustee for her separate use, and might be restrained by injunction from receiving the rents. On a motion for the injunction, the following arguments were addressed to the Court by the defendant's counsel (Mr. *Heald* and Mr. *Blenman*) in resistance of the motion:—"A gift to the separate use of an unmarried woman is insensible, so far as the attempt to limit her mode of enjoying, or her power of disposing of the gift is concerned; but even if any effect could be given to the intended restraint in a gift to the separate use of an unmarried woman, the plaintiff has, by an express agreement previous to her marriage, waived all claim to the separate enjoyment of the property in question, and she cannot call upon a Court of equity to give her a benefit which she has waived in consideration of marriage. Under the will of her father she took an absolute interest in the property. The attempt to prescribe the mode of enjoying the property by limiting it to her sole and separate use gave her no interest which she might not have secured for herself, and imposed no obligation upon her to enjoy the property in a particular manner, but must be regarded as wholly inoperative. Even married women are considered as *femes sole* with respect to their separate estate; and may, if they think proper, according to the decision in *Pybus* v. *Smith*, 3 Bro. C. C. 340, and the cases which preceded it, dispose of their separate property to their husbands. It can never be held, therefore, that an unmarried woman, who is *sui juris*, has a more limited power of disposing of property given to her than a married woman. There is no case in which the Court has directed property given to a woman *sui juris* to be settled to her separate use after her marriage, no

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executors and trustees of this my will. And I appoint the said [*executors*] and the survivors and survivor of them, or other the

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agreement for a settlement having been made previously to the marriage. If the wife were to prevail in this case, the settlement of the property to her separate use would be a positive fraud upon the husband. A secret conveyance of property made by a woman pending a treaty of marriage is fraudulent and void against the intended husband, if the marriage take effect. How, therefore, can the Court direct an assignment to be made which it would set aside if made by the wife herself pending the treaty of marriage, as a fraud upon the marital right? At all events, this is not a case in which the Court will interfere to restrain the defendant by an interlocutory order." The Vice-Chancellor (Sir *J. Leach*) granted the injunction. A motion was afterwards made before Lord *Eldon* to discharge the order for the injunction; the same arguments were again urged on behalf of the defendant, and Lord *Eldon* refused the motion with costs. The plaintiff next obtained an order for a receiver. The cause came on to be heard before Sir *John Leach* on the 15th of November, 1822, when his Honor decreed that it be referred to the Master to approve of a proper person to be trustee of the leasehold premises in question, to the sole and separate use of the plaintiff, and that all proper parties should join in assigning the premises to such trustee. An account was also directed of the rents received by the defendant.

Remarks on *Anderson* v. *Anderson.*

This case was not cited to the Vice-Chancellor in *Newton* v. *Reid*, or to the Master of the Rolls in *Massey* v. *Parker*, (having been reported since those cases were decided—a circumstance which is in itself quite sufficient to weaken their authority). Even before the publication of the case of *Anderson* v. *Anderson*, Sir *L. Shadwell* more than once, when adverting to the alarm which the case of *Newton* v. *Reid* had excited in the profession, intimated a wish that the subject should be reconsidered before a higher tribunal. Probably his Honor (with a feeling natural to so conscientious a Judge), had been appalled by a survey of the mischievous consequences of the doctrine, as applied (though not, it is conceived, unduly applied, if tenable at all) by his contemporary, the present Master of the Rolls.*

In order to appreciate these consequences the reader should call to mind the numerous instances which probably have fallen under his observation, in which income already in terms devoted to the separate use of a woman independently of any after-taken husband, has been allowed on her marriage to continue in its actual state without any further settlement in her favour, in full reliance on the efficiency of the existing trust to preserve it from the power of the husband. In such cases the property is, by the doctrine in question, *placed at the absolute disposal of the husband*, and may

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* See now *Benson* v. *Benson*, 6 Sim. 130, commented on, *post*.

trustees or trustee for the time being of this my will, guardians or guardian of my children during their respective mi-

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(if he has become bankrupt or insolvent) have vested in his assignees; and trustees, who from time to time have paid over the income to the wife under the authority of the supposed trust for her separate use, have brought upon themselves the responsibility incident to a misapplication of the fund. Nor is the injury inflicted by the doctrine confined to the wife and her trustees. It is well known that the separate income of married women is often the subject of sale or mortgage, and the general practice has been not to join the husband in the assignment executed by the wife to the purchaser or mortgagee. In such cases, according to the doctrine in question, the wife, having herself no title, can have communicated none to the purchaser or mortgagee, and the husband (to supply whose necessities possibly the sale or mortgage may have been made), or his assignee (if he has become bankrupt or insolvent), is at liberty (except in a very particular case)* to exert the powers incident to his marital ownership, in defiance and disregard of his wife's previous dealing with the property.

Having taken a brief survey of the evils flowing from the new doctrine where coverture has actually supervened, it remains to be seen by what modifications, if any, of the existing mode of framing testamentary and other provisions for unmarried females, these evils can be averted; for, it is to be observed, that whatever opinion the draughtsman may entertain of the soundness of the recent cases, as those cases indicate the actual opinions of two living Equity Judges, (and who at present, let it be remembered, wield, in conjunction with a common-law Judge, the authority of the great seal), it would be imprudent in him, even now, to neglect any precaution which the new doctrine, if eventually established, will require should be adopted.

Mode of settling income on unmarried females, suggested by the doctrine of *Newton* v. *Reid* and *Massey* v. *Parker*.

One of the most obvious contrivances of this kind is to vest in trustees a power of settling the income on the marriage of the *cestui que trust*. In order to render this plan efficient, it is essential that the trustees should have an absolute discretionary power to determine the nature of the settlement; for, if the trusts are chalked out by the author of the gift, the rights of the parties claiming under those trusts being at once definitively fixed and ascertained, the mere fact of the benefit being made to flow to them through the medium of a more formal settlement, to be executed by the trustees—in other words, of the trust being executory—would not prevent the husband from becoming entitled under the doctrine of the recent cases. The chief objection to the plan just suggested is,

* Vide *Cordell* v. *Elliott*, 5 Madd. 149, referred to, *ante*, Vol. 5, p. 575, 2nd Ed.

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norities. I GIVE to my wife [*name*], the sum of £——, to be paid by my executors as soon as conveniently may be after my

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Legacies to wife of £—— and housekeeping stores,

that it leaves too much to the discretion of the trustees, who may possibly settle the income on the husband himself, or, which would be equivalent in effect, (if the property was alternatively given to the wife), may neglect to make any settlement of it at all. But the possibility of this (which supposes an abuse, or a very singular conception by the trustees of their discretionary power, or great negligence in its exercise) is certainly a less evil than that of permitting the property absolutely to go to the husband.

Another scheme is, to impose an obligation on the female herself, when she marries, to settle, or, if under age, to procure from her intended husband a covenant to settle, the income for her separate and inalienable use, on pain of incurring a forfeiture, or, in other words (and which seem more correctly to describe the nature of the transaction) to vest in her the income until marriage, with a power to settle it or procure it to be settled for her separate and inalienable use during any contemplated coverture, taking care of course to dispose of the income in some other manner, in the alternative event of no such settlement being made. In such case, as the interest of the *cestui que trust* under the existing trust absolutely ceases on marriage, there is nothing on which the marital claim can attach. This, upon the whole, seems to be the best expedient that occurs to the writer, but it is not adapted to certain special cases, such as that of a female under age marrying either a minor, or an uncertificated bankrupt, or an insolvent debtor: in which case, as the intended wife would be incapable by her own act of settling the income, and the intended husband of binding his marital interest, no effectual settlement could be made in compliance with the condition in the will. In this particular instance, however, a power to settle might be confided to the trustees, as in the scheme first suggested. Neither of the proposed expedients, however, should be so absolutely adopted as to preclude advantage being taken of the doctrine of *Newton* v. *Reid* and *Massey* v. *Parker* being overruled in the House of Lords; for, when it is considered that both these cases were decided in direct opposition to and in ignorance of an anterior adjudication on this particular point; and that, in *Massey* v. *Parker*, the opinion of the Master of the Rolls was extra-judicial, (the case having been previously disposed of by him on another ground), and seeing too the mischievous effect of the new doctrine—that effect being no less than to transfer a large mass of property to the hands of those whose title it had been the anxious wish of the donors to exclude, and most inconveniently to cramp the power of parents to modify the interests of their unmarried daughters—it is impossible to abandon the hope, and would be wrong to forego the advantage, of an effectual stand being yet

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decease. AND I GIVE to my said wife all my housekeeping and other consumable stores for her absolute use and benefit; and I direct that my said wife shall enjoy for her natural life such of my household furniture and other household effects which shall be in and about the house in which I may happen to reside at the time of my decease, as she shall think proper to select for that purpose; and I direct that my said wife shall not be required

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made against this innovation.* Accordingly, where income, either of real or personal estate, is intended to be given to an unmarried woman for life, exclusively of marital claims, there should be always inserted a trust for separate use, and a restriction on anticipation during any coverture, independently of the cesser clause by which it is now proposed to accompany such trust, and which clause should be made to take effect only in case of the prohibition proving to be inoperative.

The manner of carrying into effect these several suggestions will appear by the precedents in the text. Where the *cestui que trust* is actually under coverture at the time of the making of the will, the editor has not generally thought it worth while to introduce a proviso for cesser, applicable to the event of her again becoming discovert. An example, however, of this kind will be found. (*Vide ante*, p. 530).

In those cases in which a woman possessed of income settled to her future general separate use has actually married without any further settlement being made, all that can be done is to procure the husband, if living and solvent, to settle the income in question to the separate and inalienable use of his wife, or to confirm any assignment or charge she may have made, and to release trustees from responsibility for any past misapplication of the fund.

Where a woman entitled under such a trust is about to marry, the course obviously dictated by the new doctrine is, for the intended wife, with the assent of the husband, to resettle the fund in question during the contemplated coverture for her separate and inalienable use. (*Vide* precedent, *ante*, Vol. 9, p. 362). The validity of such a trust, created in contemplation of a particular impending coverture, seems to be admitted on all hands.

In those instances in which testators, who have inserted in their wills general trusts for the separate use of unmarried female legatees, are yet living, it seems to be proper that they should be apprized of the infirmity which the new doctrine, if established, will impart to these trusts, in order that they may have an opportunity of new modelling them. A subsequent precedent exhibits the form of a codicil framed for this purpose.

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* This hope is greatly strengthened by Sir *L. Shadwell's* observations in the case of *Benson* v. *Benson*, 6 Simons, 130 (just published).

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to sign any inventory of such effects. I GIVE to my said wife such portion of my plate as belonged to her before our marriage, for her own absolute use and benefit. I GIVE the residue of my plate unto my children [*names*], equally to be divided among them or such of them as shall be living at my decease, in equal shares; and in case any dispute shall arise respecting the distribution of the said plate, I empower my executors to select and determine the specific articles to be taken by each legatee under the said bequest. AND WHEREAS, under or by virtue of the will of [*wife's father*], late of —— deceased, I am entitled (after payment of the said testator's debts, and funeral and testamentary expenses, and certain pecuniary legacies and annuities thereby given) to one-fourth part of the moneys arising from and to be produced by the sale of the real and personal estates of the said testator. NOW, I hereby give and bequeath the said one-fourth part or share, and all my right, title, and interest therein and thereto, to the said [*trustees*], their executors or administrators, UPON TRUST to lay out and invest the same in the names or name of the said trustees or trustee, in or upon the public stocks or funds, or other government securities of Great Britain and Ireland, or in or upon real securities in England or Wales (from time to time, varying the securities as often as it shall be deemed expedient so to do), and to pay the dividends, interest, and annual produce arising from the said stocks, funds, or other securities, as the same shall from time to time arise and become due, to my said wife, or permit or empower her to receive the same for and during the term of her natural life; and from and after her decease, then, as to the said trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thenceforth to arise therefrom, IN TRUST for such one or more of the children (whether named in this my will or not) or more remote issue of me the said [*testator*], (such more remote issue to be born in the lifetime of my said wife) in such parts, shares, and proportions (if an appointment shall be made in favor of more than one object), subject to such provisoes and restrictions, and in such manner in all respects, as she my said wife, by any deed or deeds, or by her will or any testamentary writing, shall direct or appoint, give or bequeath the same; And in default of any such direction or appointment, gift or bequest, UPON TRUST to pay,

Bequest of testator's share of residue under the will of his father-in-law to trustees.

In trust for testator's wife for life; and after her death,

In trust for testator's children and issue as wife shall appoint; And in default of appointment,

In trust for chil-

transfer, and divide the said trust-moneys, stocks, funds, and securities, unto and equally between or among each and every child of mine who shall be living at the time of the decease of my said wife, and also the issue, if any, then living, of any child or children who shall have previously died either in my lifetime or after my decease, such children and issue respectively to take in equal shares; but so, nevertheless, that the issue of any child or children of mine shall take the share or respective shares only which his, her, or their parent or ancestor, or respective parents or ancestors only would have been entitled to if living; And I expressly declare, that the gift or trust lastly hereinbefore contained unto or in favor of the issue of any child or children of mine, shall extend to issue of every degree (*c*), and that such issue shall be entitled per stirpes. *(Add hotchpot clause, as in former precedents).* And I declare that my executors shall have full power to adjust, settle, and compromise with the executors of the said [*wife's father*], all accounts, questions, and disputes (if any) relating to the said one-fourth share hereinbefore bequeathed, either by a reference to arbitration or in such other manner as my said executors in their uncontrolled direction shall think proper, and also to give full and complete releases and discharges to the said executors of the said [*wife's father*] in respect thereof. And I declare that my said wife shall be entitled to the interest, dividends, and annual income accruing from or in respect of the said one-fourth part or share, from the day or time of my decease, until the actual payment or receipt thereof; And in case the said one-fourth part or share hereinbefore bequeathed in the proceeds of the said real and personal estates or any part thereof, shall be received by me in my lifetime, then I give and bequeath to the said [*trustees*], their executors and administrators, a sum of money equal to the sum or amount so received, upon such and the same trusts, and to and for such and the same trusts, intents, and purposes in all respects, as are hereinbefore expressed concerning the moneys arising from the said one-fourth part or share hereby bequeathed, such legacy or sum of money to be retained and appropriated as soon as

dren and issue living at wife's decease, *per stirpes*.

Clause explanatory of the term "issue."

Power to executors to settle accounts with executors of testator's father-in-law.

Destination of income of bequeathed residue.

In case bequeathed share should be received in testator's lifetime, bequest of equal sum of money on similar trusts.

(*c*) *Vide ante*, p. 452.

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convenient after my decease, and to bear or carry interest at the rate of 4*l.* per cent. per annum from the day of such my decease. I GIVE to my son [*name*] (with whom I have been for many years in partnership, in the profession or business of an attorney, solicitor, and conveyancer) for his absolute use and benefit, All my share and interest in the law-books, stationery, office furniture, books of account, and also in the deeds, documents, papers, and writings belonging to or in the custody of the said firm at the time of my decease. I ALSO GIVE to my said son for his absolute use and benefit, all the deeds, documents, papers and writings (including precedents and manuscript cases and opinions) collected and accumulated by me in the course of my professional practice, or which shall be in my custody or possession on my sole and separate account at the time of my decease, subject nevertheless to the paramount right or claim (if any) of any other person or persons otherwise to regulate and dispose of the custody thereof (*d*). AND WHEREAS, by indentures of lease and release bearing date respectively on or about the —— days of ——, made between [*vendor*], of &c., of the one part, and me the said [*testator*] of the other part; in consideration of the sum of £—— expressed to be paid by me to the said [*vendor*], the said [*vendor*] did convey and assure unto me the said [*testator*], ALL THAT [*describe parcels*], TO HOLD the same unto and to the use of me the said [*testator*], my heirs and assigns for ever. AND WHEREAS the said sum of £——, the purchase-money mentioned in the said indenture, was the proper money of [*devisee*], of &c., and my name was inserted therein as a trustee for and on the behalf of the said [*devisee*], but no declaration of trust or conveyance has been made or executed by me touching the premises; Now, I hereby give and devise all and singular the —— hereditaments and premises comprised in the hereinbefore mentioned indentures, with the appurtenances to the same belonging, to the uses following, (that is to say), *To such uses*, for such estates, and to and for such intents and purposes, and in such manner and form, as the said [*devisee*] by any deed or deeds shall appoint; And in default of and

Share of law-books, office furniture, papers, &c. to testator's son (with whom he was in partnership).

Recital of conveyance to testator, and that the same was made to him as trustee.

Devise of estate so conveyed to the person beneficially entitled, to uses for preventing dower.

(*d*) As to a solicitor's right to the custody of drafts, deeds, and other documents, *vide ante*, Vol. 7, p. 60.

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subject to any such appointment, *To the use* of the said [*devisee*] and his assigns during his life; and after the determination of that estate by any means in his lifetime, *To the use* of [*dower trustee*], of &c., his executors or administrators during the natural life of the said [*devisee*], IN TRUST for him and his assigns; and after the determination of the last-mentioned estate, *To the use* of the said [*devisee*], his heirs and assigns for ever (*e*). AND I GIVE AND DEVISE to my said son [*name*], all other the freehold and copyhold hereditaments whatsoever and wheresoever which are vested in me as trustee, whether by conveyance, devise, descent, survivorship, or otherwise, TO HOLD the same unto and to the use of my said son [*name*], his heirs and assigns for ever, or for all my estate and interest therein, subject nevertheless to the trusts and equities which for the time being may affect the same premises respectively; And I empower my said son in the execution of such trusts, by any deed or deeds to be attested by one witness or more, to limit and appoint the said hereditaments to such uses, and for such estates, and in such manner as he shall think proper (*f*). And I empower my said son [*name*], to receive the credits of our said partnership firm, and in his uncontrolled discretion to settle, adjust, and wind up the accounts and transactions thereof, without any interference on the part of my executors hereinbefore named; And I empower my said son to compound for any claims of the said partnership upon or against any person or persons whomsoever; And I direct that my said son [*name*], after paying or providing for the debts owing by the said partnership firm, shall from time to time account for and pay over to my executors, my part or share in the net or clear proceeds of the credits received by him as aforesaid.

Devise of other trust estates to testator's partner, son.

Power to testator's partner to wind up partnership affairs without interference of executors.

(*e*) This devise exemplifies a suggestion, *ante*, p. 159. Sometimes it is advisable not to allow the trust to appear. In regard to leasehold property and any other species of personalty, the disclosure of the trust is useful in facilitating the claim of the legatee to take the property exempt from legacy-duty. Probably, however, the commissioners would require, for this purpose, evidence of the trust, beyond the testator's own acknowledgment.

Remark on devise of trust estate.

(*f*) This devise of trust estates to the testator's son coincides with and is obviously a material part of the scheme of securing to him the advantages connected with the testator's professional business.

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I GIVE to my said executors and trustees, their executors or administrators, the sum of £—— of lawful money of Great Britain and Ireland, to be retained and appropriated by them within six calendar months after my decease, UPON TRUST, to place out the same in their names in the public stocks or funds, or other government securities, of Great Britain and Ireland, or at interest upon real securities, with full power from time to time at discretion, to alter, vary, and transpose such stocks, funds, and securities, and to stand possessed thereof, upon the trusts following (that is to say), UPON TRUST to pay the interest and dividends arising from the said trust fund to my aunt [*name*] for her life, for her sole and separate use, exclusively of her present or any future husband, and so that she shall have no power to alien or anticipate the same, subject nevertheless to the proviso hereinafter contained; And after her decease, UPON TRUST, to pay and divide the said trust fund unto and equally between [*names*] two of the daughters of my said aunt, share and share alike, as tenants in common, the same to be vested interests in them respectively immediately on my decease; And I declare that in case at any time or times hereafter the said [*aunt*] shall, from disease or infirmity or any other cause, be incapable of giving a discharge for the said dividends, interest, and annual produce, it shall be lawful for my trustees or trustee for the time being, to apply the same in such manner for her benefit as they or he, in their or his discretion, shall think proper (*g*). PROVIDED ALSO, and I further declare, that in case my said aunt shall survive her husband the said [*husband*], and shall afterwards assign or dispose of the said dividends, interest, annual produce of the said trust moneys, stocks, funds, and securities, or any part thereof, or the same shall by any means whatsoever become (or, but for this present proviso, would become) vested in or payable to any husband of the said [*aunt*], or any other person or persons, then and in such case the trust hereinbefore declared in favour of the said [*aunt*] shall im-

Pecuniary legacy to trustees to be invested

In trust for testator's aunt (a married woman) for life;

and after her decease, upon trust for her two daughters.

Power to trustees, in case of *cestui que trust* becoming unable to give a discharge, to apply income for her benefit.

(*g*) This trust is adapted to the case of a person who is subject to attacks of lunacy, or labours under any other species of mental imbecility. A trust in favour of a deaf and dumb person also requires some such provision.

mediately thereupon cease, and the said dividends, interest, and annual produce shall and may, during the residue of her natural life, be applied by the said trustees or trustee for the time being to and for the benefit of her the said [*aunt*], and the child or children or more remote issue for the time being of the said [*aunt*], or some or one of such objects exclusively, and in such shares, if more than one, as the said trustees or trustee in their or his absolute and uncontrolled discretion shall think proper. AND AS TO all and singular my messuages, farms, lands, and hereditaments, and real estate not hereinbefore disposed of (except the hereditaments vested in me as mortgagee), and also all the residue and remainder of my moneys, securities for money, goods, chattels, and all other my personal estate and effects of which I shall be possessed at the time of my decease, I give, devise, and bequeath the same and every part thereof respectively unto the said [*trustees*], their heirs, executors, and administrators, TO HOLD the same unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns, upon the trusts following (that is to say), UPON TRUST as soon as conveniently may be after my decease to sell and dispose of my real estate, either by public auction or private contract, as the said trustees or trustee shall think proper, and to convey and assure the same in such manner as the purchaser or purchasers thereof shall direct; AND also as soon as conveniently may be after my decease, except as to the articles hereinbefore bequeathed to my said wife, and as to such articles as soon as conveniently may be after her decease (*h*), to sell and dispose of or otherwise convert into

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Proviso for cesser on alienation.

General residuary devise and bequest to trustees,

Upon trust for sale and conversion.

(*h*) Where a life interest is created in property, the ulterior interest in which is blended with the general residue, and such residue is subject to an immediate trust for sale and conversion, the effect of the trust may seem to be to render the ulterior interest immediately disposable as a reversion. This, however, would be contrary to the intention of the testator, who, no doubt, in such cases, means that the property shall be sold when it falls into possession by the determination of the particular interest, and not before. This is so obviously the more beneficial course, that a judicial expositor of the will would probably lean to such a construction; which, however, it is better to render indubitable by explicit declaration, as in the text.

As to subjecting a reversionary interest to an immediate trust for sale.

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money such parts of my residuary personal estate as shall not consist of money or securities for or investments of money, being such as my trustees shall think proper to continue (and which they are hereby authorized to do), and to collect, get in, and receive the remaining parts of the same residuary personal estate; And I hereby further declare that the said trustees and trustee shall stand possessed of, as well the said residuary personal estate and the money to arise and be produced therefrom, as the money to be produced by any sale or sales to be made of the said real estate, after paying, satisfying, or retaining thereout all my just debts, funeral and testamentary expenses, and all expenses incident to the execution of the trusts hereby created, and also the pecuniary legacies hereinbefore bequeathed, IN TRUST for such of my five children hereinafter named (that is to say) [*names*] (*i*), and any child or children of mine hereafter to be born, as shall be living at the time of my decease, and as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, for the absolute use and benefit of such children respectively, in equal shares; subject nevertheless as to one moiety or equal half part of the share of each of my daughters to the trusts hereinafter declared concerning the same; PROVIDED ALWAYS, and I direct and declare, that in case at the time of my decease any of my children being a son or sons shall not have attained the age of twenty-one years, or being a daughter or daughters shall not have attained that age or been married, then it shall be lawful for the trustees or trustee for the time being of this my will to lay out and invest in their or his names or name the presumptive or expectant share of each such child in the said trust-moneys arising and to be produced as aforesaid, in the public stocks or funds, or other government securities of Great Britain and Ireland, or on mortgage of freehold, copyhold, or leasehold estates, or other real securities in England or Wales, with liberty from time to time

Trust for certain existing children and all after-born children.

Power to apply income for maintenance of children during minority.

(*i*) This trust is adapted to rather a special intention in regard to the class of children to be entitled, namely, the letting in of such only of the testator's existing children as he has named, together with the whole range of unborn children.

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to vary the same as the said trustees or trustee shall think proper, and from time to time in their or his discretion to apply all or any part of the yearly dividends, interest, or annual produce of the said presumptive or expectant share of each such child in the said trust premises, being a son during his minority, or being a daughter during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; and that so much, if any, of the dividends, interest, or annual produce arising from the presumptive or expectant share of each such child respectively as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof, or so much of the said accumulated fund as for the time being shall be unapplied to such maintenance as aforesaid, shall be added to the principal of the share whence the same shall have arisen. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, in their or his discretion, to apply any part not exceeding one-half of the principal of the expectant or presumptive share of each such child of mine as last aforesaid, in the said trust moneys, stocks, funds, and securities, in apprenticing him or her to any profession, trade, or business, or otherwise in or towards the advancement or preferment in the world, or otherwise for the benefit of the child or children to whom such share or respective shares shall presumptively or apparently belong, in such manner as the said trustees or trustee shall think proper. AND I empower the trustees for the time being of this my will, in the exercise of the trust for sale hereinbefore contained, in their discretion, to purchase in any part of my trust estate which shall be offered for sale by auction, and also to rescind or vary the terms of any contract for sale which may have been entered into, and also to make and enter into any special conditions and stipulations relative to title or otherwise; And I further empower my executors and trustees for the time being to compound for and release any claims or demands which they may have upon or against any person or persons whomsoever, upon such terms and conditions as they shall think proper, and also to suspend or delay the enforcement thereof for such time or times as shall be deemed expedient, and to permit any money to remain on

Power to apply a moiety of principal for advancement during minority.

Usual discretionary authorities to trustees.

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personal or any other security on which the same shall happen to be invested at the time of my decease, and generally to grant such indulgences to debtors of my estate as the said executors and trustees for the time being shall think proper; And I also empower them to pay any sum or sums of money which shall be claimed from my trust estate, upon such evidence, whether strictly legal or not, as they shall deem sufficient and satisfactory, and also to refer to arbitration any dispute with and to give full and ample discharges to any person or persons with whom I in my lifetime, or the said executors and trustees respectively after my decease, shall have had any accounts, dealings, or transactions whatsoever; And I direct that all and every purchaser and purchasers of my trust estate, or any part thereof, and all and every other person and persons paying any moneys, or transferring any stocks, funds, or securities to the trustees or trustee for the time being of this my will shall be exempt from all responsibility in respect of the application thereof; And I further declare that if it shall appear to my trustees to be expedient to delay or suspend the sale and conversion of any part of my real or personal estate under or by virtue of the aforesaid trust in this behalf, it shall be lawful for them so to do, and in the meantime the income arising from so much of the said real and personal estate as shall remain unconverted (*k*) shall

Exoneration to persons paying trust moneys.

Remarks upon the trustees' authority to delay the conversion of the trust property.

(*k*) The necessity for this clause appears from the doctrine discussed, *ante*, Vol. 6, p. 311. The ordinary clause, enabling trustees to postpone the sale and conversion of trust property, and providing that the income in the meantime shall be paid to the persons who would be entitled to the income of the funds arising from the sale, is not adapted to some special cases, as where part of the property consists of a reversion, yielding no present income, or of a life annuity, or a leasehold for a short term, yielding an undue proportion of income. In the two last-mentioned instances it is obvious that such a provision would place an unfair advantage in the hands of the person taking the immediate income. In such special cases some equitable mode of adjusting the relative claims of the immediate and ulterior takers must be sought for. One is for the testator to give the immediate taker, as an equivalent for the income of the proceeds of the sale, a fixed annuity, until the entire trust property is converted, as in a former precedent, (*ante*, p. 272). Another is to vest in the trustees a discretionary power to determine the amount of the equivalent. A third and more usual

go and be applied from the time of my decease in the same manner in all respects as the income arising from the stocks, funds, and securities to be purchased with the proceeds thereof would have gone and been applicable under the trusts hereinbefore contained; nevertheless I declare that my real estate shall for the purposes of transmission be absolutely impressed with the qualities of personalty from the time of my decease. I GIVE AND DEVISE unto the said [*trustees*], their heirs and assigns, all the freehold and copyhold hereditaments vested in me as mortgagee for my own benefit, and of which the right or equity of redemption shall be subsisting at the time of my decease (*l*), To HOLD the

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Devise of estates vested in testator as mortgagee.

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course is to direct a valuation to be made of the reversion, annuity, or other such property, the conversion of which is suspended, and interest at a prescribed rate to be paid on the amount of such valuation. This might be effected by such a clause as the following:—

PROVIDED always, and I hereby declare that if any part of the trust estate, the sale or conversion of which shall be suspended under the aforesaid power, shall consist of life annuities, or property held by lease determinable with any existing life or lives, or for a term of years of which less than fifty years shall be unexpired at my decease, or shall consist of reversionary interests, which shall not yield or produce any immediate income, then I empower and direct my trustees to cause an estimate to be made by some competent person or persons of the value of such property at the time of my decease, and to pay to the person or persons who would have been entitled to the income arising from the proceeds thereof, if sold, interest at the rate of 4*l.* per centum per annum on the amount of such valuation, to commence and be computed from the day or time of my decease, and to be payable half-yearly, so long as the conversion of the said property shall be suspended as aforesaid, with a proportional sum for any less period than a half year.

Special provision where the sale of an annuity, or leasehold, or reversion, is suspended.

(*l*) In strictness devises of estates, vested in a testator as mortgagee, should be restricted to those of which the right or the equity of redemption shall be subsisting at his death; for it is obvious that such devises are not intended to comprise estates which become irredeemable in the testator's lifetime. Unless the devise is restricted as in the text, the *legal* estate in property of this description would clearly pass by it, notwithstanding

Remark upon devises of estates vested in a testator as mortgagee.

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same (subject to such equity of redemption) unto and to the use of the said [*trustees*], their heirs and assigns, UPON TRUST to convey and assure the same, and apply and dispose of the moneys arising therefrom in such manner as shall be requisite and proper for the purpose of carrying into effect the trusts and purposes of this my will. PROVIDED ALWAYS, and I hereby declare, that in case the said [*trustees*], or any or either of them, or any trustees or trustee for the time being nominated and appointed in their or his place or stead, shall die (either in my lifetime or after my decease), or shall on my decease, or at any time or times afterwards, renounce or become unwilling or unable to act in the aforesaid trusts (not including therein the trusts concerning the shares of my daughters in the trust premises) (*m*), before the said trusts shall be fully executed and performed, then and so often as the same shall happen, it shall be lawful for my children the said [*five children*], and any child or children of mine hereafter to be born, or such of the same children respectively as for the time being shall be living and of full age and otherwise competent to exercise this present power, and if there shall be no such person, then for the surviving or continuing trustees or trustee for the time being, or if there shall be no such trustee, then for the renouncing or retiring trustees or trustee, or if there shall be no such last-mentioned trustee, or they or he shall decline to act in the premises, then for the executors or administrators of the last deceased trustee to appoint any fit person or persons to supply the place or places of the trustee or trustees respectively so dying, or becoming unwilling or unable to act as

General power of appointing new rustees.

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the testator's acquisition by foreclosure, long possession, or otherwise, of the equitable title.

Arrangement of clauses.

(*m*) After the failure or determination of the general trusts, each daughter is empowered, by the subsequent clause respecting the nomination of trustees, to supply vacancies occurring in respect of her own share. The powers to the several classes of trustees have been inserted in the following order:—those relating to the general trust estate are placed immediately after the trusts affecting the general property, and the powers to the trustees of the daughters' respective shares, and applying exclusively to such shares, immediately follow the declaration of trusts concerning the shares in question.

aforesaid; and that immediately after every such appointment the said trust estates, moneys, and effects, stocks, funds, or securities, shall, at the expense of my trust estate, be conveyed, assigned, and transferred so and in such manner that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustees or trustee, or in such new trustee or trustees solely, as the case may require, subject to the trusts aforesaid; and such new trustee or trustees shall have and may exercise, as well before as after the execution of such conveyance and assignment as aforesaid, all the powers and authorities whatsoever hereinbefore contained, in the same manner to all intents and purposes as if he, she, or they had been appointed a trustee or trustees by this my will. AND it is my will, and I hereby direct and declare that the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being to be appointed as hereinafter mentioned, shall stand and be possessed of one moiety or equal half part or share of and in the part or share of each and every child of mine, being a daughter, of and in the moneys, stocks, funds, and securities arising from or composing the residuary real and personal estate and effects hereinbefore devised and bequeathed, upon the trusts following (that is to say), UPON TRUST, to lay out and invest the said trust-moneys in the names or name of the said trustees or trustee in or upon the public stocks or funds, or other government securities of Great Britain and Ireland, or on mortgage of freehold, copyhold, or leasehold estates or other real securities, in England, with liberty from time to time to vary any stocks, funds, or securities for the time being vested in them, him, or her as often as the said trustees or trustee shall think proper. AND UPON FURTHER TRUST, from time to time, to receive the dividends, interest, and annual produce arising from the stocks, funds, and securities for the time being composing the said moiety or equal half part of the share of each such daughter of mine as aforesaid, and pay the same, or permit the said dividends, interest, and annual produce to be received by such daughter during her natural life, for her separate use, free from the control and debts of the husband for the time being (if any) of such daughter respectively, so that during coverture she shall have no power to alien or an-

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Trusts declared of daughters' shares.

To pay income to each daughter, for separate and inalienable use for life, and, after her decease,

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ticipate the growing payments of the said dividends, interest, and annual produce, or any part thereof, subject nevertheless to the proviso for cesser hereinafter contained; and from and after the decease of such daughter of mine as aforesaid, then as to as well the said trust moneys, stocks, funds, and securities constituting such moiety or equal half part as aforesaid, of the respective share of each such daughter in the said trust premises, as the yearly dividends, interest, and produce thenceforth to arise therefrom, IN TRUST for all or any one or more of the children, grandchildren, or other issue of such daughter (such grandchildren or other issue to be born in her lifetime), for such interest or interests, and in such proportions, if more than one, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such provisions for maintenance, education, and advancement, and to be paid or transferred at such age or ages, either absolutely or upon such contingencies and in such manner in all respects as such respective daughter of mine, whether covert or sole, shall at any time, or from time to time, by any deed or deeds revocable or irrevocable, to be duly executed, or by her last will and testament, or any testamentary writing, direct or appoint; but so nevertheless that any object of this present power, of either sex, shall not take or acquire any transmissible interest by virtue of any appointment by deed, to be executed in pursuance thereof, until such appointee shall have attained the age of twenty-one years, or shall have married; and in default of such direction or appointment, and subject to any partial direction or appointment, then as to the said stocks, funds, and securities, and the dividends, interest, and annual produce to arise therefrom after the decease of such respective daughter of mine, IN TRUST for all and every the child and children of such respective daughter of mine, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, if more than one, in equal shares, as tenants in common, for the absolute use and benefit of such child or children respectively; and, if there shall be no child of such daughter of mine who shall live to acquire a vested interest in such daughter's share of the said trust premises under the trust lastly hereinbefore contained, IN TRUST for all and every or such one or more of my

In trust for the children or more remote issue of daughter as she shall appoint; and, in default of appointment,

In trust for children equally; and, on failure of children,

In trust for tes-

other children who shall be living at the decease of such daughter, or the issue who shall be living at such decease of any child or children of mine then living or dead, and if more than one, in such parts, shares, and proportions, and subject to such provisoes and restrictions, and in such manner and form in all respects as each such daughter of mine shall at any time or times, whether covert or sole, by any deed or deeds, revocable or irrevocable, to be duly executed, or by her last will and testament in writing, or any testamentary writing, direct or appoint (*n*); but so nevertheless that any object of this present power of either sex shall not take or acquire any transmissible interest, by virtue of any appointment by deed as aforesaid, until such appointee shall have attained the age of twenty-one years, or shall have married; and in default of such direction or appointment, and subject to any partial direction or appointment of the said trust premises, then as to the said stocks, funds, and securities, (including any accruing or additional share or shares which shall or may have been acquired by virtue of this present clause), I direct and declare that the said trustees or trustee for the time being shall stand and be possessed thereof, and the dividends, interest, and annual produce to arise therefrom, upon the same or the like trusts and for the same or the like intents and purposes as are hereby declared concerning the other or remaining parts or shares of the moneys arising from my residuary real and personal estates, or such of the same trusts, intents, and purposes as shall happen to be subsisting or capable of taking effect; save and except only, that the whole or entire share accruing to any and every daughter of mine under or by virtue of this present clause, shall be subject to the trusts and restrictions hereby declared concerning one moiety of the original share of such daughter respectively. PROVIDED ALSO, and I further declare, that no child of any daughter of mine, in whose favor any appointment shall be made by such daughter as aforesaid, shall, unless such appointment shall expressly so direct, be entitled to share or participate in the unappointed part (if any) of the trust premises, without bringing his or

testator's other children or issue living at decease of daughter, as she shall appoint;

and in default of appointment,

Upon the same trusts as are declared concerning the other shares.

Hotchpot clause.

(*n*) These trusts exhibit that inequality between the shares of sons and daughters, which has been the subject of remark in a former note. *Vide ante*, p. 481.

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her appointed share or interest into hotchpot or distribution any rule of equity to the contrary notwithstanding. PROVIDED ALSO, and I further direct and declare, that in case at the determination by death or otherwise of the interest of any daughter of mine in the said trust premises, or in case at any period after such determination (*o*) during the life of such daughter, any of her children, grandchildren, or other issue, who, under the trusts hereinbefore contained, or under any appointment or appointments to be made in his, her, or their favour, by virtue of the power hereinbefore contained, shall be entitled to any vested or presumptive share or respective shares of the said trust-moneys, stocks, funds, or securities, being a male or males, shall not have attained the age of twenty-one years, or being a female or females shall not have attained that age or been married, then (subject and without prejudice to any contrary direction or regulation in any such appointment) it shall be lawful for the trustees or trustee for the time being of the share of such daughter in the said trust premises (*p*) in their, his, or her discretion from time to time to apply all or any part of the yearly dividends, interest, or annual produce of the vested or presumptive share of each such child, grandchild, or issue, being a male during his minority, or being a female during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And I declare that it shall not be incumbent on the said trustees or trustee to inquire as to the applicability of any other fund, or the liability of any existing parent of the said minor or minors respectively to provide such maintenance; and that (subject as aforesaid) so much, if any, of the dividends, interest, or annual produce arising from the share or presumptive share of each such child, grandchild, or issue respectively as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof, or so much of the said accumulated fund as for the

Power to apply income for maintenance of children and issue during minority.

(*o*) These words are rendered necessary by the provision which makes the daughters' life interests determinable before their decease.

(*p*) It will be observed, that, under the power of changing trustees, the shares of the daughters may become vested in distinct classes or sets of trustees.

time being shall remain unapplied for such maintenance as aforesaid, shall be added to the principal of the share whence the same shall have arisen. PROVIDED ALSO, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, during the life of each daughter of mine, and so long as she shall be interested in the said trust-premises, with her consent in writing, and after the death of such daughter or after the determination of such her interest, then in the discretion of the said trustees or trustee, to apply any part not exceeding one-half of the principal or value of the vested or presumptive share of each or any of the children, grandchildren, or issue of such daughter in the said trust-moneys, stocks, funds, and securities, under or by virtue of the trusts hereinbefore contained, or under or by virtue of any appointment or appointments to be made as aforesaid (subject nevertheless to any contrary direction or regulation therein contained) for the apprenticing of such child, children, or issue respectively, to any profession, trade, or business, or otherwise in and towards his, her, or their advancement or preferment in the world, in such manner as the said trustees or trustee in their, his, or her discretion shall think proper. PROVIDED ALSO, and I further declare, that it shall be lawful for any and every daughter of mine, notwithstanding all and every or any of the trusts hereinbefore contained, and in derogation of the same trusts, by her last will and testament or any testamentary writing, to bequeath to any husband who may happen to survive her, during his life, any part or share not exceeding one moiety or equal half part of the dividends, interest, and annual produce hereby made payable to such daughter, and also, subject to the trust hereinbefore declared in favour of the children of such daughter, and without prejudice thereto (*q*), to bequeath to such husband during his life as aforesaid, the other or remaining moiety or equal half part of such dividends, interest, and annual produce. PROVIDED ALSO, and I further direct and declare, that if by reason of the discoverture of any daughter or daughters of

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Power of advancement.

Power to daughters to bequeath life interests to husbands.

Special proviso for cesser of life interest of any

(*q*) The effect of this power, it will be observed, is, to enable the daughters by will to bequeath a *moiety* of the income to any husband as against the children, and the *entirety* as against all other objects of the trusts.

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daughter who shall assign her share, or shall marry without settling income for her separate and inalienable use.

mine respectively at the time of my decease or afterwards, the restraint on anticipation hereinbefore imposed on her or them respectively shall be or become inoperative, and if any such daughter or daughters respectively shall at any time or times after my decease, (except for the purpose of such settlement as hereinafter mentioned) assign, charge, or in any manner dispose of the interest, dividends, and annual produce hereinbefore made payable to her or them respectively, or any part thereof, or in case such daughter or daughters respectively shall at any time or times after my decease marry, and shall not, previously to any and every such marriage, execute or cause to be executed an effectual settlement or effectual articles for the settlement of the dividends, interest, and annual proceeds hereby made payable to her or them respectively as aforesaid, to and for the separate use of such daughter or daughters respectively, exclusively of her or their intended husband or husbands respectively, and without power of alienation during her or their intended coverture or covertures respectively; and if by reason of no such settlement or articles being executed, the said interest, dividends, and annual produce, or any part thereof, shall become (or would but for this present proviso become) vested in or payable to the husband of such daughter, or any person or persons claiming through or under him (*r*), then and in either of the cases afore-

(*r*) This explicit enumeration of the several contingencies on the happening of which the cesser proviso is to take effect, may be in some respects useful as directing the attention of the legatee to the acts to be done or avoided, but it is not essential. The following shorter form would be equally effectual:—

Shorter form of proviso for cesser.

"PROVIDED ALWAYS, and I further declare, that if by reason of the marriage of any daughter of mine subsequently to my decease without executing or causing to be executed, previously to such marriage, a settlement or articles for a settlement of the income of her share in the said trust premises, subjecting such income to a trust for her separate and inalienable use during her life, or if by any act of such daughter while discovert, or by any other means whatsoever, the said income, or any part thereof, shall become payable to any person or persons other than such daughter, then, and in any and every such case, the trust hereinbefore declared," &c.

In framing this clause and that in the text, it will be observed, that

said, the trust hereinbefore declared in favour of such daughter shall immediately thereupon cease and determine, and the interest, dividends, and annual produce to which she shall be or would have been entitled shall thenceforth during her natural life, be paid and applied by the trustees and trustee for the time being, for the benefit of such daughter or daughters respectively, and the person or persons who would for the time being be entitled thereto by virtue of the trusts aforesaid, if such daughter were actually dead without having exercised either of the powers of appointment hereby vested in her, or to or for the benefit of some or one exclusively of the other or others of the said several objects, and in such proportions (if divided among more than one) and in such manner in all respects as the said trustees or trustee in their, his, or her uncontrolled discretion shall think proper. NEVERTHELESS, I declare, that no actual distribution or transfer of the capital of the said trust funds and premises or any part thereof, shall be made unto or among the child or children of any daughter of mine until the decease of such daughter, to the intent that any child or children of any such daughter who may happen to be born after the determination of her interest under the aforesaid proviso may not be excluded (*s*). PROVIDED ALSO, and I further direct and declare, that in case any daughter or daughters of mine shall marry before her or their attainment to the age or respective ages of twenty-one years, it shall be lawful for the trustees or trustee for the time being of this my will, if they, he, or she shall deem it expedient so to do, to settle the whole or any part of the moiety or half part hereinbefore bequeathed absolutely to such daughter or daughters respectively, of her or their share or respective shares in the said trust moneys, stocks, funds, and securities, upon such trusts, for the benefit of such daughter or daughters respectively so marrying, and her or their intended husband or respective husbands, and the children or more remote

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Power to trustees to settle the other moiety of shares of daughters marrying under age.

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care has been taken that the interest of the *cestui que trust* shall not cease upon marriage and neglect to execute a settlement, unless these circumstances are attended with the effect of entitling the husband—a point which is especially important, considering the tendency of the Vice-Chancellor's remarks in the recently published case of *Benson* v. *Benson*, 6 Sim. 130, stated *post*.

(*s*) *Vide ante*, p. 452.

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issue of such daughter or daughters, or for the benefit of one or more exclusively of the other or others of these several objects, and in such manner and form in all respects, and with such accompanying powers, provisions, and declarations as the said trustees or trustee in their, his, or her uncontrolled discretion shall think proper (whether my daughter or daughters so marrying as aforesaid shall concur in and consent to the settlement or settlements to be made by the said trustees or trustee or not). And I direct that the expense attending any and every settlement hereby directed or authorized to be made, shall be paid and deducted out of the capital or principal of the trust-funds and premises to which the same shall or (but for this present clause) would relate. Provided also, and I further declare, that all and every person and persons paying any moneys or transferring any stocks, funds, or securities to the trustees or trustee for the time being of the respective shares of my daughters in the said residuary personal estate, stocks, funds, and securities, shall be exempt from all responsibility in respect of the application thereof. Provided also, and I further declare, that in case at any time or times after the failure or determination of the power of changing trustees hereinbefore contained, any trustees or trustee for the time being of the shares of my said daughters respectively in the said trust premises, shall die or shall become unable or unwilling to act in the trusts hereby declared concerning the same shares respectively, before such trusts shall be fully executed and performed, then, and in every such case, it shall be lawful for each daughter of mine in respect of her own share in the said trust moneys, stocks, funds, and securities, and if such daughter shall have departed this life, then for the husband of such daughter, if any, who may for the time being be entitled to the income of any part of the said trust premises, under any testamentary appointment to be made in his favour as aforesaid, and if there shall be no husband so entitled (*t*), or if any such

Exoneration of persons paying trust-moneys to trustees of daughters' shares.

Power to appoint new trustees in respect of daughters' shares.

(*t*) Observe the difference between this clause, which vests the power of new appointment in each daughter respectively in regard to her own share, and the general clause, *ante*, p. 536, which vests the power in regard to entire trust property in the children for the time being. The power relating to the several shares, it will be observed, does not take effect until the general power has determined.

daughter or husband (as the case may be) shall be unable, by reason of minority or from any other cause, to exercise this present power, then, and in every such case, it shall be lawful for the surviving or continuing trustees or trustee for the time being of the trust funds and premises in respect of which such vacancy shall have occurred as aforesaid, and if there shall be no such trustee, then for the retiring trustees or trustee, and if there shall be no such last-mentioned trustee, or they, he, or she shall decline to act in the premises, then for the executors or administrators of the last deceased trustee, to nominate any fit person or persons, not being beneficially interested, or the husband of any person beneficially interested in the premises in respect of which such nomination shall be made, to supply the place or places of the trustees or trustee respectively so dying or becoming unwilling or unable to act as aforesaid; and that, immediately after every such nomination, the trust funds and premises, in respect of which such vacancy shall have occurred as aforesaid, shall be assigned and transferred at the expense of such funds and premises in such manner as that the same may vest in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or in such new trustee or trustees solely, as the case may require, subject to the trusts aforesaid; and such new trustee or trustees shall have and may exercise, as well before as after the execution of such assignment and transfer as aforesaid, all the powers and authorities hereinbefore contained concerning the said share or shares respectively, in the same manner as if he, she, or they had been appointed a trustee or trustees thereof by this my will. PROVIDED ALSO, and I further declare, that the trustees for the time being of this my will of each respective class shall be charged with such sums of money only as they respectively shall actually receive, notwithstanding their joining in or signing any receipt or receipts, or doing any other act for the sake of conformity, and that they or any of them shall not be answerable or accountable for any involuntary misfortune, loss, or damage which may happen in the execution of the aforesaid trusts; and that it shall be lawful for the said trustees respectively, out of the money which shall come to their respective hands by virtue of the trusts aforesaid, to retain and also to allow to each

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Indemnity to trustees.

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other all costs, expenses, and fees to counsel for advice, which they or any of them may incur in the execution of the aforesaid trusts or in relation thereto. And I especially declare, that any and every trustee for the time being of this my will of each respective class shall be allowed full costs as between attorney and client, and any and every trustee being of the profession of an attorney, solicitor, or conveyancer, shall be at liberty to make the same professional charges for business transacted for the trust estate as he would be entitled to make if he were not a trustee. PROVIDED ALSO, and I hereby lastly direct and declare, that the said [*trustees*], or the survivors or survivor of them, or other the trustees or trustee for the time being of this my will nominated and appointed in their or his place, under or by virtue of the power of appointing new trustees firstly hereinbefore contained, shall have full power and authority to decide upon, adjudge, and determine any question, doubt, or dispute which shall arise among my children or more remote issue, or any persons claiming through or under such children or issue respectively, touching and concerning the true and proper construction and effect of this my will or of any clause or expression therein contained, or touching and concerning the rights and interests of my children or more remote issue respectively, under or by virtue of the same, provided that the decision of such trustees or trustee shall be in accordance with and shall be supported by the opinion in writing of some one of his Majesty's counsel practising in the Court of Chancery, or of some one conveyancing counsel of not less than seven years' standing at the bar, to be nominated by my said trustees or trustee. And I direct and declare, that in case any of my children or more remote issue, or such other person or persons as aforesaid, shall refuse to abide by the award and decision of my said trustees, supported as aforesaid, and shall file any bill in equity or institute any other proceeding or proceedings whatsoever either at law or in equity for the purpose of obtaining the judgment or determination of any court or courts of law or equity upon or concerning such doubt, question, or dispute as aforesaid, then, and in every such case, I absolutely revoke and make void every gift, bequest, and trust contained in this my will to or in favour of the person or persons who shall so act, any rule of law or

Power to the trustees to determine questions concerning the construction of the will.

OF A SOLICITOR, PARTNERSHIP PROPERTY, UNMARRIED DAUGHTERS, &c.

equity in anywise notwithstanding; and I give and bequeath the share, property, and interest comprised in every such revoked gift, bequest, and trust to such person or persons, and for such purpose or purposes as the same would have gone and been applicable to under this my will, if the object or objects of such gift, bequest, or trust had died in my lifetime (*u*). And I hereby revoke all former wills by me at any time heretofore made. In witness whereof I the said [*testator*], the testator, have to this my last will and testament, contained in —— sheets of paper, set and affixed my hand and seal to the last sheet thereof, and subscribed my name at the bottom of every other sheet, this —— day of ——, in the year of our Lord 18—.

Signed, &c.

Remark on trustees' power of deciding on construction of will.

(*u*) What is the precise operation of a clause of this nature, under certain circumstances, it may be rather difficult to define; there is no doubt, however, of its having a pacific tendency, as few persons would be so imprudent as to incur the risk (for at least it must be admitted that there would be *risk*) of forfeiture, by refusing to bow to the decisions of the testator's tribunal of interpretation.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

WILL *of a Widower devising a Freehold* MESSUAGE *to Testator's eldest* SON *for* LIFE, *with Remainder (subject to a Power of Selection in favour of his (Son's)* CHILDREN *and* ISSUE) *to his* CHILDREN *in Fee* EQUALLY, *with* CLAUSE *of* ACCRUER, *and* PROVISION *for Maintenance. In Default of Children of eldest Son, to Testator's* SECOND SON *and his* CHILDREN *and* ISSUE, *in a similar manner.* RESIDUE *of* REAL ESTATE *and of* PERSONALTY *is given to Trustees, upon Trust for* SALE *and* CONVERSION. *Proceeds to be divided* EQUALLY *among Testator's* CHILDREN, *and the* ISSUE *of any dying in Testator's Lifetime, or before the Period of* VESTING, *per Stirpes.* POWERS *of* MAINTENANCE *and* ADVANCEMENT *during* MINORITY. AUTHORITY *to Executors to* DIVIDE HOUSEHOLD FURNITURE, &c. *among the* CHILDREN *and* ISSUE, *or at Discretion to* SELL *same. Usual* POWERS *to* TRUSTEES *to* COMPOUND DEBTS, *refer* DISPUTES *with Creditors or Debtors to* ARBITRATION, *and* PAY DEMANDS *without strict Evidence. Devise of* ESTATES *vested in Testator as* MORTGAGEE *or* TRUSTEE. INDEMNITIES *to and Power of* CHANGING TRUSTEES (*including Special Authority to a sole Trustee to nominate new Trustees* BY WILL). APPOINTMENT *of* GUARDIANS.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator*], of &c. I DIRECT that all my just debts and funeral and testamentary expenses shall be in the first place duly paid. I GIVE unto [*trustees*], of &c., £—— each, as some compensation for the trouble they may have in the execution of the trusts of this my will. I GIVE unto my cousin [*name*] of &c., £——, as a token of my affectionate regard. And I GIVE unto my friend [*name*], of &c., £——, as a mark

Direction to pay debts.

Legacies to trustees, &c.

of my esteem, and in grateful recollection of his many friendly and professional services. And I direct the said legacies to be paid within three months after my decease, free from legacy duty. I give and devise all that my freehold messuage or tenement situate at ——, now in my occupation, with the appurtenances thereto belonging, to the uses following (that is to say), *To the use* of my son [*name*], and his assigns, during his life, and after the determination of that estate by any means in his lifetime, *To the use* of the said [*trustees*], and their heirs, during the life of the said [*son*], Upon trust, by the usual means, to preserve the contingent remainders hereinafter limited; nevertheless, to permit the said [*son*] and his assigns to receive the rents and profits thereof; and after the decease of my said son, *To the use* of such one or more of the children or more remote issue of the said [*son*], for such estate or estates, in such shares (if an appointment shall be made in favour of more than one), and subject to such provisions for maintenance during minority, and other powers, provisoes, limitations, and restrictions in favour of any one or more of such children or more remote issue, as the said [*son*] shall, by any deed or deeds revocable or irrevocable, to be by him duly executed, or by his last will and testament in writing, or any testamentary writing to be also duly executed, shall, at any time or times, or from time to time, direct or appoint. And I declare, that it shall be lawful for my said son, if he shall deem it expedient so to do, in the exercise of the aforesaid power, to limit and appoint the said hereditaments to any person or persons, Upon trust to sell the same, and to pay and apply the moneys arising therefrom unto or for the benefit of any object or objects of the said power, and to authorize such trustee or trustees to discharge the purchaser or purchasers from liability to see to the application thereof (*a*); but I expressly declare, that no child or other issue of my said son shall take or acquire any

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Devise of freehold messuage to testator's son for life; remainder,

To son's children and issue, as he shall appoint;

(*a*) A power to appoint to a certain class of objects has been held to be well executed in equity by an appointment to trustees for sale, with a direction to apply the produce for the benefit of the objects of the power. *Kenworthy* v. *Bate*, 6 Ves. 793; *Bullock* v. *Fladgate*, 1 Ves. & Bea. 478. But a doubt is entertained by some practitioners whether, in such case, the donee is enabled to clothe the trustees with the power of giving discharges for the purchase money.

Whether power of selection authorizes an appointment to trustees for sale.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

descendible or transmissible estate or interest under or by virtue of any such appointment as aforesaid, until such appointee or appointees respectively shall have attained the age or respective ages of twenty-one years or shall marry (*b*);

Expediency of restraining a parent from appointing to minor and unmarried children.

(*b*) Under the old law of inheritance it was not necessary to guard a father's power of selection over freehold estates in favour of his issue against that species of abuse in its exercise, noticed by Lord *Eldon* to have been practised in *Lord Sandwich's case*, cit. 11 Ves. 479 (where the donee of such a power exercised it in favour of a child supposed to be in a consumption), because a freehold estate so appointed could not, in the event of the subsequent death of the appointee, descend from him to the donee; so that it was not possible for the latter to derive any direct personal advantage from the perpetration of such a fraud. Now, however, that the father is placed within the line of inheritors (his position in that line being immediately after lineal descendants, *vide* stat. 3 & 4 Will. 4, c. 106, stated *ante*, p. 218), powers of selection over realty are susceptible of the same abuse, and therefore require the same preventive expedient as similar powers over personal estate. For instance, suppose that the donee, under the power in the text, should, immediately on the birth of a child, appoint the remainder in fee to such child*, and the appointee should happen to die without issue and intestate, (and intestate he necessarily would be if he died during minority), the remainder would descend to the father, who, it is observable, might, by reserving to himself a power of revoking the appointment, retain in his own hands the means of recalling his donative act, if, contrary to expectation, the appointee should outlive childhood. Where the parent to whom the power is reserved is the *mother*, the reason for the precaution in question loses part, but only a part, of its force, as the donee would be entitled (supposing the subject of the power to be personalty) to participate with the brothers or sisters, or nephews or nieces, if any, of the appointee, in the distribution of his or her personal estate, and not, like the father, to take the whole in preference to all collateral relatives whatever. (*Vide ante*, p. 220). Still, however, the incentive is sufficient to warrant and call for the adoption of the restriction in question: indeed, if the donee happened to have no other issue than the appointee, the interest of the mother, being the sole presumptive or expectant next of kin, would be precisely the same as that of a father. In regard to freehold estates, the mother is also, under the recent enactment, competent to inherit, and takes precedence of all persons who trace their descent through her. She, however, and all persons claiming through her, are postponed to

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* But as to such an appointment, see Lord *Hinchinbroke* v. *Seymour*, 1 B. C. C. 394.

and in default of such direction or appointment, and subject thereto, *To the use* of all and every the child and children of my said son [*name*] begotten and to be begotten, his, her, and their heirs and assigns, for ever, if more than one, as tenants in common. And if any of such children shall die under the age of twenty-one years, and without having been married, then, as to the share or respective shares, as well original as accrued, of such child or children respectively in the said messuage or tenement and hereditaments, *To the use* of the other or others of such children, his, her, and their heirs and assigns, for ever, if more than one, as tenants in common. And if any child or children of my said son shall, at the time of his decease, be under the age of twenty-one years and unmarried, then I empower the said [*trustees*], or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, to enter into the receipt of the rents and profits of the said hereditaments, and apply the same or so much thereof as shall arise from the share or respective shares of such minor or minors therein, under or by virtue of the limitations aforesaid, for the maintenance, education, and support of such minor or minors, in such manner as the said trustees or trustee shall think proper (*c*). Provided always, and I hereby declare, that no child of my said son who shall take any part or share in the said hereditaments hereinbefore devised, under or by virtue of any appointment to be made thereof as aforesaid, shall be entitled (unless such appointment shall expressly so direct) to share with the other child or children in any unappointed part, share, or interest thereof or therein, unless such child or children respectively shall bring his, her, or their appointed share or shares respectively into hotchpot or distribution with the other child or children of

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

and in default of appointment, to the use of children equally.

Clause of accruer.

Power to apply rents for maintenance during minority.

Hotchpot clause.

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the paternal line. The result, therefore, is, that, in regard both to real and personal estate, a power of selection in favour of issue, whether reserved to the father or mother, may be properly subjected to the qualification in question, unless, indeed, the power authorizes testamentary appointments only, to which, it is obvious, the reason for any such restriction on its exercise does not apply.

(*c*) The property being of small value, no provision is made for the event of the income exceeding what is required for maintenance.

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my said son. And in case my said son [*name*] shall have no child who shall survive me and who shall attain the age of twenty-one years or marry, then I give and devise the said messuage or tenement, hereditaments, and premises, to such and the like uses, for such and the like estates and interests, upon such and the like trusts, and subject to such and the like power of appointment and other provisoes and declarations in all respects, to or in trust or for the benefit of my son [*second son*] and his child or children or more remote issue, as are hereinbefore expressed and contained to or in trust or for the benefit of my said son [*eldest son*] and his child or children or more remote issue, as fully and effectually as if the same were here repeated. *(Add power to lease, and, if intended, power to sell.)* I GIVE, DEVISE, AND BEQUEATH all other my freehold, leasehold, and copyhold messuages, lands, hereditaments, and premises whatsoever and wheresoever (except such estates as are vested in me as mortgagee or trustee) unto the said [*trustees*], their heirs, executors, administrators, and assigns respectively, UPON TRUST, that the said [*trustees*], or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, or other the trustees or trustee for the time being of this my will, of their, his, or her own proper authority, either immediately after my decease or at any time afterwards, as they, he, or she shall deem it expedient or advisable, do and shall make sale and absolutely dispose of the said trust premises, either altogether or in one lot, or by parcels or in several lots, and either by public auction or private contract, or partly by public auction and partly by private contract, as the said trustees or trustee for the time being, in their, his, or her discretion, shall think fit, with liberty, if the said trustees or trustee should think fit, to buy in the said premises and resell the same at any future auction or by private contract, without being liable to answer for any loss occasioned by such resale, and also to make and enter into any special conditions or stipulations relative to title or otherwise; with power also to rescind or consent to any variation or alteration in the terms or conditions of any contract or contracts, and UPON FURTHER TRUST to convey and assure the same premises when sold unto the person or persons who shall agree to become the purchaser or purchasers thereof, and to his or their heirs, executors, administrators, or

In default of children of first son, to same uses for second son and his children and issue.

Devise of residue of freehold, leasehold, and copyhold estates, upon trust to sell.

assigns, or to such uses and upon such trusts as such purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns shall direct or appoint; AND UPON THIS FURTHER TRUST, that my said trustees or trustee for the time being do and shall, by, with, and out of the money which shall arise by or from such sale or sales respectively, in the first place deduct, retain, satisfy, and pay unto and for themselves and himself respectively the costs, charges, and expenses of and attending the execution of the trusts aforesaid, and the money which the said trustees or trustee may disburse or expend in or about any suit or suits at law or in equity for obtaining possession of the said premises or in enforcing the performance of any contract or contracts which may have been entered into with any person or persons who shall agree to become the purchaser or purchasers of the said premises or any of them. AND I DIRECT, that the residue or surplus of the moneys arising from such sale or sales shall sink into and form part of my residuary personal estate, and be subject to the bequest and disposition hereinafter made concerning the same. AND I FURTHER DECLARE, that the rents and profits arising from the said trust premises until the sale thereof as aforesaid, after paying thereout the expenses of repairs and insuring the buildings from damage by fire, shall from time to time be paid and applied to and for such and the same persons and purposes in all respects as the income arising from my residuary personal estate is hereby made payable and applicable to and for under the disposition thereof and the trusts concerning the same respectively hereinafter contained. And I further declare, that such part of my freehold and copyhold hereditaments as from time to time shall remain unsold and unconverted shall be deemed to be of the nature of personal estate. AND I AUTHORIZE AND EMPOWER my trustees or trustee for the time being, either to divide my books, furniture, and other household effects amongst my children and issue, whether they shall be of age or not, in such parts, shares, and proportions, and at such times and manner as they shall think fit, or otherwise to sell all or any part thereof, and add the produce of such sale to my residuary personal estate hereinafter bequeathed, as my said trustees or trustee, in their or his uncontrolled discretion,

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Declaration of trusts of purchase moneys.

Direction concerning intermediate rents.

Authority to trustees to divide furniture, &c. among the children, or sell.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

shall think fit. AND AS TO, FOR, AND CONCERNING all the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may be or consist, I give and bequeath the same and every part thereof respectively unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST, that the said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being, do and shall, with all convenient speed after my decease, possess, collect, and get in the credits and sums of money which shall or may belong or be due or owing to my estate, with full powers for the said trustees or trustee, if they or he shall deem it expedient, to refer to arbitration, or arbitration and umpirage, any dispute or disputes concerning any debt or debts owing to or from me, and also to compound for and accept less than the full amount of the moneys due or owing to my estate, in complete discharge and satisfaction thereof, as they or he in their or his discretion shall think best, and to give or allow time for the payment of any sum and sums of money due and owing as aforesaid, without being answerable for any loss in respect thereof, and likewise to pay any sum or sums of money claimed to be owing by me, upon such evidence, whether strictly legal or not, as the said trustees or trustee shall think proper; AND, UPON FURTHER TRUST, to collect and receive all other moneys which shall be due to my estate. AND I DIRECT AND DECLARE, that my trustees or trustee for the time being shall stand possessed of my residuary personal estate hereinbefore bequeathed, IN TRUST for such of my children as shall attain the age of twenty-one years, and the issue who shall attain that age of such of my children as shall die in my lifetime, or shall after my decease die under the age of twenty-one years, as tenants in common, such issue nevertheless (including as well children as more remote issue) only taking amongst themselves, per stirpes, as tenants in common, the part or share which his, her, or their deceased parent or ancestor would have been entitled to receive, if such parent or ancestor had lived to acquire a vested interest therein, it being my intention that no issue of any degree shall take any in-

Bequest of residuary personal estate to trustees.

Power to trustees to refer to arbitration, compound debts, and pay claims not duly evidenced.

Trust for children.

terest concurrently with but only in the place of his, her, or their parent or ancestor (*d*); but if there should be only one such child or issue, then the whole thereof to be in trust for such only child or issue. PROVIDED ALWAYS, and I do hereby further direct, that in the meantime and until the share or shares of my children or issue respectively shall become vested or transferable under the trusts aforesaid, the rents, dividends, interest, and income of the presumptive or expectant or probable share of such child or issue respectively of and in the said trust moneys and premises, or so much thereof as shall by my trustees or trustee for the time being be deemed or considered as requisite or necessary, shall be applied, by or under the direction and guidance of the guardian or guardians (if any) of such child, children, or issue; or if none, then at the discretion of such trustees or trustee for or towards the maintenance and education of such children or issue respectively so entitled in expectancy, and the residue of such interest or dividends shall from time to time be laid out at interest to accumulate for the benefit of the same child, children, or issue, or other person or persons who shall ultimately be entitled under the trusts of this my will to the principal from which such accumulation shall arise; but such accumulated fund, notwithstanding the investment thereof, shall continue and be applicable to the maintenance and education of the child or children respectively from whose presumptive or expectant share or respective shares the same shall have arisen. PROVIDED ALSO, and I further direct, that it shall be lawful for my trustees or trustee for the time being, with the consent of the guardians or guardian

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Until vesting, income of presumptive shares to be applied for maintenance.

Power to trustees to advance any part of presumptive shares for the advance-

(*d*) In a former note, the reader's attention was directed to the necessity of distinguishing plainly between gifts to children and gifts to issue, *ante*, p. 452. In regard to the latter, another caution may here be added. Where the intention is to let in issue of every degree (and unless such is the intention the word ought not to be used at all), it should be made distinctly apparent whether the issue are to take per stirpes or per capita. The former, probably, is usually intended; for a testator seldom means that all the individuals of every stock of issue shall be entitled *pari passu*: each stock, whatever may be the number of individuals composing it, is intended to be restricted to the share belonging to its head or ancestor, no person being admitted to a participation in the lifetime of and concurrently with, but only in the room of, his or her parent.

As to whether issue are to take per stirpes or per capita.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

ment of children.

for the time being (if any) of my said children or issue respectively, or, if there should not be any guardian, then of the proper authority of the said trustees or trustee to advance and apply any part or parts of the respective probable or presumptive portion or share, portions or shares, of such child, children, or issue respectively, of and in my said trust moneys, stocks, funds, or securities, for the putting or placing him, her, or them in or to any profession, trade, or business, or otherwise for his, her, or their benefit or advancement in the world, although such child, children, or issue respectively shall not, at the time or respective times of advancing or applying the same for any or either of the purposes aforesaid, have acquired a vested interest or vested interests therein.

Power to trustees to lease.

PROVIDED ALSO, and I further declare, that the trustees or trustee for the time being acting in the execution of the trusts of this my will shall have power to lease all or any part of the said freehold, leasehold, and copyhold messuages, lands, hereditaments, and premises, or such part or parts thereof, as, for the time being, shall remain unsold under the trusts aforesaid, for any term not exceeding twenty-one years; so that the full annual rent be reserved, and no fine taken for granting the same.

Indemnity to purchasers and others paying trust moneys.

PROVIDED ALSO, and I declare, that the person or persons who shall become the purchaser or purchasers of all or any part of the said premises under the trusts herein contained, and also all and every other person and persons who from time to time shall or may pay any sum or sums of money to the trustees or trustee for the time being of this my will shall be wholly free and exempt from all responsibility in respect of the application of the moneys paid to such trustees or trustee; and that every receipt which shall be given for the said trust moneys, or any part thereof, or the interest, dividends, and income of the same, or any part thereof, or the rents and profits of the said premises, by the trustees or trustee for the time being of this my will, shall be an effectual discharge for the sum or sums of money which therein respectively shall be acknowledged to be or to have been received.

Power to make investments and change securities.

AND I HEREBY FURTHER DECLARE, that my trustees or trustee for the time being do and shall, from time to time, during the continuance of the aforesaid trusts, of their or his own authority, lay out and invest the said trust moneys, or so much

thereof as shall from time to time be collected, got in, or possessed by them or him, at interest either in or upon any of the stocks or funds of Great Britain, or upon real securities in England or in the principality of Wales, and also do and shall, from time to time, of their or his own authority, alter, vary, and change the securities in or upon which the said trust moneys shall from time to time be invested under the power aforesaid, or in or upon which any part of my personal estate shall be invested at the time of my decease, as my said trustees or trustee for the time being shall deem proper; and do and shall stand possessed of and interested in the said trust moneys and securities, and the dividends, interest, and income thereof, upon the trusts and subject to the several powers and declarations hereinbefore expressed concerning the same. I GIVE AND DEVISE unto the said [*trustees*] all such real estates as are now vested in me as mortgagee or trustee, *To hold* the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, or for all my estate and interest therein, subject nevertheless to the equities affecting the same respectively, and to the intent that such of the trusts and purposes affecting the said trust premises as at the time of my decease shall be subsisting may be carried into effect. PROVIDED ALSO, and I declare, that the trustees for the time being of this my will shall be charged and chargeable only for such moneys as they respectively shall actually receive by virtue of the trusts hereinbefore contained, notwithstanding their giving or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and that such trustees respectively shall not be answerable or accountable for any banker or other person with whom or in whose hands any part of the said trust moneys shall or may be deposited for safe custody or otherwise in the execution of the trusts hereinbefore mentioned, and that the said trustees respectively shall not be answerable or accountable for any other involuntary loss or damage which may happen in the execution of the aforesaid trusts, or in relation thereto; and also that it shall be lawful for the trustees for the time being of this my will, by and out of the moneys which shall come to their respective hands by virtue of the trusts aforesaid, to retain for themselves respectively, and to pay to and allow to each other their full

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Devise of estates held as mortgagee or trustee.

Indemnity to trustees.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Power of appointing new trustees.

costs, as between attorney and client, in relation to the said trust estate, any rule of law or equity to the contrary notwithstanding. PROVIDED ALWAYS, and I hereby further declare, that in case the said [*trustees*], or any or either of them, shall die in my lifetime, or at my decease shall renounce or be incapable of acting in the trusts hereof, or in case all, any, or either of the trustees for the time being of this my will shall, during the continuance of any of the aforesaid trusts, cease to reside in the united kingdom of Great Britain and Ireland, or shall die, or desire to be discharged from the aforesaid trusts, or refuse or become incapable to act therein, or shall be adjudged a bankrupt, or take the benefit of any act for the relief of insolvent debtors, then, and so often as the same shall happen, it shall be lawful for the surviving or continuing trustees or trustee for the time being, or, if there shall be no such trustee, then for the executors or administrators of the last surviving or last acting trustee for the time being, by any deed or deeds to be sealed and delivered in the presence of and attested by one or more witness or witnesses, or, if the person exercising this present power shall be an only surviving or continuing trustee, or any other single individual, by his or her last will and testament, or any testamentary writing (*e*), to nominate and appoint some other fit person or persons to be a trustee or trustees for the purposes aforesaid, or any or either of them, in the place or stead of the trustee or trustees dying in my lifetime, renouncing, ceasing to reside in the united kingdom, or dying or desiring to be discharged, or refusing or becoming incapable to act, or becoming bankrupt or insolvent as aforesaid (*f*); and that every such new trustee shall and may act and assist in the management and execution of those trusts to which he or she shall be so appointed, as fully and effectually

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(*e*) This would sometimes be useful, as the trustee exercising the power by will might not only nominate the new trustees, but vest the trust estate in them; and there is this obvious convenience in the proceeding, that the same event which creates the vacancy, namely, the testator's death, supplies the vacant trusteeship with a new functionary.

(*f*) Observe that the usual direction respecting the conveyance and transfer is omitted.

in all respects, and with the like powers and indemnifications, as he or she might have done if originally in and by this my will appointed a trustee for the purposes aforesaid, or as if his or her name had been inserted in this my will in the place of the trustee in whose stead he or she shall be substituted. And I hereby nominate and appoint the said [*trustees*] to be executors in trust of this my will; and I nominate and appoint the said [*trustees*], and the survivors and survivor of them, to be guardians and guardian of the persons and estates of my children during their respective minorities; but such guardianship to cease as to each or either of the guardians who shall go to reside abroad, refuse or become incapable to act in the said guardianship, or become bankrupt or insolvent (*g*). And I hereby revoke all former wills by me made, and declare this writing to be my last will and testament. In witness whereof I the said [*name*], the testator, have to this my last will and testament, contained in —— sheets of paper, set my hand and seal, that is to say, to the first —— sheets thereof my hand, and to this —— and last sheet thereof my hand and seal, the —— day of ——, in the year, &c.

TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

Appointment of executors and guardians.

Signed, sealed, and published by the said [*name*], the above-named testator, as and to be his last will and testament, in the presence of us, who, in his presence and at his request, and in the presence of each other, have hereto subscribed our names as witnesses. } [*Three Witnesses.*]

(*g*) Another, and perhaps a preferable mode, is to constitute the trustees for the time being guardians; but some gentlemen doubt, whether the office of guardian can properly be vested in such a fluctuating body.

CODICIL ADDING NEW TRUSTEE.

CODICIL *appointing* ADDITIONAL EXECUTOR, TRUSTEE, *and* GUARDIAN.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, by my last will and testament, bearing date on or about the —— day of ——, I have given, devised, bequeathed, and appointed all and singular my real and personal estates, whatsoever and wheresoever, and also all the real and personal estate over which I had a power of appointment, unto [*trustees*] of &c., their heirs, executors, administrators, and assigns, upon certain trusts therein expressed and contained, and with such powers and authorities in reference thereto as are in my said will contained; and I have appointed the said [*trustees*] executors of my said will and guardians of such of my children as at the time of my decease may happen to be under the age of twenty-one years. AND WHEREAS, since the date and execution of my said will, my eldest son [*name*] hath attained his age of twenty-one years, and I am desirous to nominate and appoint him to be a trustee and executor of my will, and guardian of my minor children, in addition to the trustees, executors, and guardians named therein as aforesaid: Now I hereby [give (*a*), devise, bequeath, and appoint unto the said [*trustees of will*], and my said son [*name*], all and singular my real and personal estates whatsoever and wheresoever, and also all the real and personal estates over which I have any power of appointment, TO HOLD the same

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(*a*) The clause within the brackets is unnecessary; it is sufficient for the testator to intimate his intention that the name of his son shall be added to those of the trustees and executors appointed by his will. Indeed the redisposing of the property requires care; for, unless the clause is framed in exact conformity and correspondence to the disposing clause in the will, it becomes doubtful whether the dissimilarity is to be ascribed to negligence or to diversity of intention.

CODICIL ADDING NEW TRUSTEE.

unto and to the use of the said [*trustees, including son*], their heirs, executors, administrators, and assigns, upon the trusts, and for the intents and purposes, and subject to the powers and declarations in and by my said will expressed and contained concerning my real and personal estates thereby devised, bequeathed, and appointed. And I nominate and appoint my said son to be one of the executors of my said will, and one of the guardians of my said minor children. And I] direct and declare that my said will shall be read and construed in the same manner, and shall have the same operation and effect in all respects as if my said son had been named and appointed a trustee and executor thereof, and guardian as aforesaid, together with and in addition to the said [*trustees of will*], and as if the name of the said [*son*] had been in each and every instance throughout the said will added to the names of the said [*trustees of will*], excepting only that it is not my intention that my said son shall have any pecuniary legacy for his trouble in the execution of the trusts of my said will (*b*), as he will take valuable beneficial interests under the trusts thereof. And in all other respects I ratify and confirm my said will. In witness, &c.

(*b*) An expression of intention on this point seems to be necessary in order to exclude doubt.

CODICIL SUBSTITUTING NEW TRUSTEE.

CODICIL APPOINTING *a new* TRUSTEE *and* EXECUTOR *in the* ROOM *of a Trustee and Executor of the Will, who had died in* TESTATOR'S LIFETIME.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, since the execution of my will, bearing date on or about the —— day of ——, [*deceased trustee*], of &c., one of the trustees and executors named therein, hath departed this life: Now I do hereby appoint my friend [*new trustee*], of &c., to be a trustee and executor of my said will in the room and place of the said [*deceased trustee*]. AND I direct and declare that my said will shall be read and construed in the same manner and shall have the same operation and effect in all respects as if the name of the said [*new trustee*] had been inserted therein, instead of the name of the said [*deceased trustee*]. AND I bequeath to the said [*new trustee*], for his care and trouble in the execution of the trusts of my said will, the legacy or sum of £——, which in and by my said will is given or expressed to be given to the said [*deceased trustee*]. AND I declare that the said legacy shall be payable at the same time and in the same manner as the legacy for which it is substituted; and in all other respects I confirm my said will (*a*). IN WITNESS, &c.

(*a*) If the trustees take under the will any estate in freehold property, the codicil, of course, should be attested by three witnesses; and here it may be observed that, though a seal is not required by the Statute of Frauds, yet, where a will professes to exercise powers, it seems proper to affix to it a seal which may, by the terms of the instrument creating the power, be essential to its validity as a testamentary appointment.

CODICIL *revoking Will as to* ONE *of several* TRUSTEES, EXECUTORS, *and* GUARDIANS, *and* APPOINTING ANOTHER TRUSTEE, EXECUTOR, *and* GUARDIAN *in his Room. Similar Substitution as to Pecuniary Legacy.*

CODICIL CHANGING A TRUSTEE.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, in and by my last will and testament, bearing date on or about the —— day of ——, I have devised, bequeathed, and appointed all my real and personal estates whatsoever and wheresoever (except the estates vested in me as mortgagee or trustee), and also all the real and personal estates over which I had any power of appointment or disposition unto [*trustees*], of &c., To HOLD the same unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns, for ever, or for all my estate and interest therein, according to the nature and quality thereof respectively, upon the trusts and for the intents and purposes in my said will expressed and declared concerning the same. And in and by my said will I also devised to the said [*trustees*] all the estates vested in me as mortgagee or trustee, to hold the same unto and to the use of the said [*trustees*], their heirs and assigns for ever, or all my estate and interest therein respectively, for the purposes and in the manner therein mentioned; and I nominated and appointed the said [*trustees*] to be executors of my said will, and guardians of the persons and estates of such of my children as at the time of my decease may happen to be under the age of twenty-one years. Now I hereby revoke and make void the hereinbefore-recited devise, bequest, and appointment, and also the hereinbefore-recited nomination of executors and guardians, so far as respects the said [*one of the trustees*], but no further or otherwise; And I nominate, constitute, and appoint my friend [*new trustee*], of &c., to be one of the trustees and executors of my said will, and one of the guardians of the

Recital of will.

Testator revokes devises and bequests of will so far as regards one of the trustees.

CODICIL CHANGING A TRUSTEE.

persons and estates of my children during their respective minorities, in the room and place of the said [*displaced trustee*]. And I direct and declare, that my said will shall be read and construed, and shall have the same operation and effect in all respects, as if the name of the said [*new trustee*] had been throughout and in each and every instance inserted therein instead of the name of the said [*displaced trustee*]. And I revoke the legacy of £——, which by my said will I have given to the said [*displaced trustee*] for his care and trouble in executing the trusts thereof; and I bequeath the like sum of £—— to the said [*new trustee*] for the like purpose. And I direct, that the said last-mentioned legacy shall be payable at the same time and in the same manner as the said revoked legacy. And in all other respects I confirm my said will. In witness, &c.

CODICIL ON ADEMPTION OF LEGACY.

CODICIL *occasioned by the* Ademption *of the* Bequest *of a* Mortgage Debt *by* Payment *in* Testator's Lifetime (*a*).

Recital of will.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. Whereas my said will, bearing date on or about the —— day of ——, contains a legacy or bequest to my nephew [*name*], of &c., of a certain mortgage debt of £—— owing to me from [*mortgagor*], of &c., and the benefit of the securities for the same. And whereas, since the date and execution of my said will, the said mortgage debt has been paid off by the said [*mortgagor*], and the sum of £——, part thereof, has been lent and advanced by me to [*present mortgagor*], of &c., on the

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As to the ademption of bequests of debts by payment.

(*a*) For the doctrine on this subject, see *Hambling* v. *Lister*, Amb. 401; *Ashburner* v. *Macquire*, 2 B. C. C. 108; *Coleman* v. *Coleman*, 2 Ves. jun. 639; *Chaworth* v. *Beech*, 4 Ves. 555; *Fryer* v. *Morris*, 9 Ves. 360; *Gillaume* v. *Adderley*, 15 Ves. 384; *Le Grice* v. *Finch*, 3 Mer. 50; *Barker* v. *Rayner*, 5 Madd. 208; S. C. 2 Russ. 122; *Gardner* v. *Hatton*, 6 Simons, 93.

CODICIL ON ADEMPTION OF LEGACY.

security of a mortgage in fee of two messuages, being Nos. —— and ——, in —— Street, in the city of ——. Now I hereby give and bequeath to my said nephew [*name*] the last-mentioned principal sum of £——, and any arrear of interest that may happen to be due thereon at the time of my decease (*b*), and the benefit of all securities for the same respectively. And I further give and devise to my said nephew [*name*], and his heirs, all and singular the messuages or dwelling-houses and hereditaments conveyed to me by the said [*mortgagor*] for securing the said principal and interest moneys, To hold the same unto and to the use of my said nephew, his heirs and assigns, for ever, subject nevertheless to such equity of redemption (if any) as the said hereditaments shall or may be subject or liable to at the time of my decease, under or by virtue of the proviso for redemption contained in the said indenture of mortgage by which the same are held; and I nominate and appoint the said [*nephew*] to be my executor in respect of the said mortgage debt hereby bequeathed, but no further or otherwise (*c*); and I declare, that the expense of the limited probate to be taken out by the said [*nephew*] shall be borne by him. And I further give and bequeath to my said nephew [*name*] the sum of £——, to be paid out of my general personal estate as soon as conveniently may be, with interest thereon at the rate of 4*l.* per cent. per annum from the time of my decease. And I direct and declare, that if the said mortgage debt hereby bequeathed shall be paid off in my lifetime, or the bequest thereof hereinbefore contained shall become adeemed or revoked by any other dealing or transaction affecting the same, then and in such case and in lieu of such bequest, I give and bequeath to my said nephew [*name*] (in addition to the said legacy or sum of £——), the sum of £——, to be paid out of my general personal estate as soon as conveniently may be, with interest thereon at the rate of 4*l.* per centum per

(*b*) The bequest of a principal sum due on mortgage, bond, or otherwise does not carry the arrear of interest accrued at the testator's decease (see *Roberts* v. *Kuffin*, 2 Atk. 112), nor probably in general does a testator intend that it should.

Bequest of principal sum does not carry accrued interest.

(*c*) *Vide ante*, p. 330.

CODICIL ON ADEMPTION OF LEGACY.

annum (*d*) from the time of my decease. And in all other respects I confirm my said will. IN WITNESS, &c.

CODICIL DISPOSING OF LAPSED SHARE OF RESIDUE.

CODICIL BEQUEATHING SHARE *of* RESIDUE *which had* LAPSED *by Decease of Legatee since the Execution of Will;* IN TRUST *for the* WIFE *and Surviving* CHILD *of* DECEASED LEGATEE. PROVISIONS *for* MAINTENANCE *and* ADVANCEMENT. *(Short Form.)*

Recital of residuary bequest in will.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, by my will, bearing date on or about the —— day of ——, I gave and bequeathed All the residue of my personal estate and effects of which I shall be possessed at the time of my decease, or over which I had any disposing power, unto and equally among my four children [*names*], for their respective absolute use and benefit; And I appointed [*executors*], of &c., to be trustees and executors of my said will.

—Death of son.

AND WHEREAS my son [*name*] has lately departed this life, leaving a widow and one child him surviving.

Declaration of trusts concerning lapsed share.

NOW I HEREBY direct and declare, that the executors in trust named in my said will, and the survivor of them, his executors or administrators, or other the trustees or trustee for the time being thereof, shall stand possessed of the one equal fourth part or share which my said son [*deceased son*], if he had survived me, would, under and by virtue of the said will, have been entitled to of and in the residuary personal estate and effects thereby bequeathed, and the moneys arising therefrom,

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(*d*) As the bequest of the mortgage debt would (under the general rule applicable to specific legacies) entitle the legatee to the interest accruing thereon from the time of the testator's decease; these pecuniary legacies (which are intended as a substitute and equivalent for that debt) are in like manner made to carry interest from the death; otherwise the legatee would be entitled to interest only from the expiration of a year, according to the well-known general rule applicable to pecuniary legacies. *Vide ante*, p. 310.

CODICIL DISPOSING OF LAPSED SHARE OF RESIDUE.

Upon trust to lay out and invest the same in the names of the said executors or trustees in the public stocks or funds or other government securities of Great Britain and Ireland, or in real securities in England, (with power to vary the same as often as it shall be deemed expedient), and to stand possessed of the stocks, funds, or securities, in or upon which the said one-fourth share shall for the time being happen to be invested as aforesaid, Upon the trusts following, (that is to say), Upon trust to pay one moiety or equal half part of the dividends, interest, and annual proceeds of the said one-fourth share unto [*son's widow*], the widow of my said son, or permit or empower her to receive the same during her life; And as to the last-mentioned moiety or equal half part of the said one-fourth share from and after the decease of the said [*son's widow*], and also as to the other or remaining moiety or equal half part thereof from and immediately after my own decease, In trust for [*grandchild*], the only child of my said son [*deceased son*], for his own absolute use and benefit, to be paid and transferred to him on his attaining the age of twenty-one years; and in the meantime, the annual income arising from the said share, or such part thereof as my trustees may deem adequate for the purpose; (nevertheless, as to one moiety thereof, subject and without prejudice to the said life-interest of the said [*son's widow*] therein), to be applied by the said trustees for the maintenance and education of my said grandson, or in their discretion the same may be paid to his mother, the said [*son's widow*], for the purpose of being so applied (without any responsibility on the part of my trustees to see the application thereof), and the residue or unapplied portion accumulated at interest in augmentation of the capital, but the same nevertheless to continue applicable, if occasion shall require, for such maintenance and education as aforesaid. And I empower my trustees (subject and without prejudice as aforesaid) to apply any part of the principal or capital of the said share, not exceeding the sum of £——, in the apprenticing or placing out of the said [*grandson*] to any profession, trade, or business, or otherwise for his advancement in life, as the said trustees shall think proper; And in case the said [*grandson*] shall die under the age of twenty-one years without leaving issue living at his decease, Then I direct and declare that his

CODICIL DISPOSING OF LAPSED SHARE OF RESIDUE.

said part or share of and in my residuary estate and effects, and the accumulations arising therefrom as aforesaid, shall be subject to the trusts and disposition in and by my said will expressed and made concerning the other or remaining parts or shares of the same estate and effects, and the moneys arising therefrom. And in all other respects I confirm my said will. IN WITNESS, &c.

CODICIL DEVISING NEWLY PURCHASED MESSUAGE.

CODICIL *devising* MESSUAGE, PURCHASED *by Testator since the Execution of Will, to* WIFE *for Life, with Remainder to* ELDEST SON *in Fee, with a General* POWER *of* APPOINTMENT. *Direction to* TENANT *for* LIFE *to* INSURE *against* FIRE *in the joint* NAMES *of* HERSELF *and* REMAINDER-MAN.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c., bearing date on or about the —— day of ——. WHEREAS, since the execution of my said will, I have purchased the messuage in which I reside, situate at ——, with the outbuildings and garden thereto belonging, the inheritance in fee whereof has been this day conveyed to me: NOW I HEREBY GIVE AND DEVISE the said messuage, outbuildings, garden, and premises to the uses following, (namely), *To the use* of my wife [*name*], during her life, she keeping the same in good tenantable repair; and immediately after the decease of my said wife, I give and devise the said premises *To such uses*, upon such trusts, and for such intents and purposes as my eldest son [*name*], by any deed or deeds to be executed by him in the presence of and attested by one witness or more, shall at any time or times or from time to time direct or appoint; And in default of such direction or appointment, and subject to any direction or appointment which shall not be a complete disposition thereof, *To the use* of the said [*eldest son*], his heirs and assigns for ever; And I direct that my said wife shall, at her own expense, during her life, insure the said dwell-

Recital of purchase.

Devise of messuage so purchased.

ing-house and out-buildings from loss or damage by fire (*a*), such insurance to be effected in some or one of the public insurance offices in London, in the name of my said wife, for the benefit of herself and my said son, his heirs or assigns; And I further direct that my said wife shall from time to time on the request of the said [*eldest son*], his heirs or assigns, produce to him or them the policy of such insurance and also the receipt thereof shewing the payment of the premium for the current year. *(Add power of leasing).* In witness, &c.

CODICIL DEVISING NEWLY PURCHASED MESSUAGE.

CODICIL DEVISING LANDS NEWLY PURCHASED.

CODICIL *devising* Lands purchased since *the* Will *to the Trustees of the Will, upon the* Trusts *thereby* declared *of Testator's* Residuary Estate.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c., dated the —— day of ——. Whereas, since the date and execution of my said will, I have purchased certain pieces or parcels of land and hereditaments in the parish of ——, in the county of ——, which have been conveyed to me for an estate in fee simple. Now I hereby give and devise the said lands and hereditaments with their appurtenances to my friends [*trustees*], of &c., (the trustees named in my said will), *To hold* the same unto and to the use of the said trustees, their heirs and assigns, for ever, Upon the trusts and for the intents and purposes in and by my said will expressed and declared concerning my residuary real estate thereby devised. And in all other respects, I confirm my said will (*b*). In witness, &c.

(*a*) It seems to be reasonable that the costs of fire insurance should, like all other outgoings, fall on the person who has the usufructuary enjoyment. Remark as to insurance.

(*b*) A mere re-execution of the will would have the same effect as the present codicil, namely, that of subjecting the purchased lands to the operation of the residuary devise in the will; for this purpose, the testa-

CODICIL EXEMPTING LEGATEES FROM LEGACY DUTY, &c.

CODICIL ADDING TO *and* REVOKING LEGACIES, *and* EXEMPTING *Legatees in Will from* LEGACY DUTY.

I [*testator*], of &c., make this codicil to my last will and testament, bearing date on or about the —— day of ——. I GIVE AND BEQUEATH to my son [*legatee*], in my said will named, the sum of £——, in addition to what I have thereby given to him AND WHEREAS I did in and by my said will give and bequeath unto [*legatee*] the sum of £——, Now I do hereby revoke the said legacy, and do give unto him the said [*legatee*] the sum of £——, and no more. AND I declare that the legacies hereby bequeathed, and also the annuities and legacies, both general and specific, bequeathed by my said will, shall be paid and delivered to the legatees respectively without any deduction on account of legacy duty, and that such duty and all expenses incidental thereto shall be paid by my executors out of my residuary personal estate; And I confirm the said will in every particular in which the same is not hereby altered. IN WITNESS whereof I have hereto set my hand this —— day of ——, 18—.

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tor should go through all the formalities of execution *de novo*: *i. e.* he should sign, or sign and seal (as the case may be), the will in the presence of three witnesses, who should in his presence subscribe their names to a memorandum of attestation, to the following effect:—

"Resigned, [resealed], and republished by the said [*name*], the testator, as and to be his last will and testament, on the —— day of ——, in the year ——, in the presence of us, who in his presence and in the presence of each other, have hereunto subscribed our names as witnesses."

As to the constructive republication of wills by codicils, *vide ante*, p. 130.

SECOND CODICIL *to a Will directing* TESTATOR'S ESTABLISHMENT *to be kept up for a limited Period, and bequeathing to* TRUSTEES, *in lieu of pecuniary Legacy,* COMMISSION *on* SUMS RECEIVED.

CODICIL ADDING TO WILL.

THIS IS THE SECOND CODICIL TO THE LAST WILL and testament of me [*testator*], of &c., bearing date on or about the —— day of ——. I DIRECT that the executors and trustees named in my said will do and shall permit my wife to reside in and occupy my messuage, garden, and pleasure grounds at ——, in which I now reside, for the period of six calendar months after my decease, and that, during such period, (whether my said wife shall choose to reside in and occupy the said premises or not), the said executors and trustees shall maintain and keep up the establishment there upon the same scale and in the same manner in all respects as the same shall have been ordinarily maintained and kept up previously to my decease; And I direct and declare that the taxes and assessments payable in respect of the said messuage, garden, pleasure ground, and premises, wages of servants, expenses of housekeeping, and all other charges and outgoings whatsoever incident to the maintenance of my establishment as aforesaid, shall be paid and defrayed out of my residuary personal estate, anything in my said will contained to the contrary notwithstanding; And I declare that the expense of putting my servants into mourning, on the occasion of my decease, shall be considered as part of the charges of maintaining the said establishment. AND I hereby revoke the pecuniary legacy by my said will bequeathed to my executors and trustees for their trouble in the execution of the trusts thereof; and in lieu thereof I authorize and empower my said executors and trustees, and all and every other the trustees and trustee for the time being of my said will, to deduct and retain a commission or salary, at the rate of 2*l.* 10*s.* per centum on the gross

Direction to executors to keep up testator's establishment for six months after his decease.

Authority to executors and trustees to deduct commission on sums received.

CODICIL ADDING TO WILL.

amount of the moneys received by them respectively in the execution of the trusts of my said will; And in case any question shall arise in regard to the proportions in which the respective trustees shall be entitled to such commission, then I direct that the sum to be claimed by each trustee shall be proportional to and calculated on his own separate receipts; and in all other respects I confirm my said will and a former codicil thereto, bearing date on or about the —— day of ——. In witness, &c.

CODICIL INCREASING AND REDUCING LEGACIES.

THIRD CODICIL, increasing *some and* reducing *other* Pecuniary Legacies.

THIS IS THE THIRD CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. Whereas, in and by my last will and testament, bearing date on or about the —— day of ——, and two former codicils thereto, I have bequeathed to each and every of my children, who shall be living at the time of my decease, certain pecuniary legacies (*a*). Now I hereby give and bequeath to each and every of my said children, who shall be living at the time of my decease, as aforesaid, the sum of £——, in addition to the legacy or legacies which each such child will become entitled to under or by virtue of my hereinbefore mentioned will and codicils, or any or either of them; And I direct that such additional legacies shall be vested and payable at the same or the like age or ages, and with the same or the like provisions for maintenance and advancement out of the income or capital thereof, and in the same or the like manner in all respects as are in and by the said will and codicils

(*a*) It is not necessary to state the amount of the pecuniary legacies which are to be increased; indeed, the less a testator is made to enter into details of this kind the better, for it often happens that questions arise in consequence of his founding his disposition on calculations which are inaccurately made, or circumstances which are inaccurately recited.

CODICIL INCREASING AND REDUCING LEGACIES.

respectively declared concerning the pecuniary legacy or legacies thereby bequeathed to such child or children respectively (*b*). And I hereby revoke the legacy or sum of £——, in and by the first of my hereinbefore mentioned codicils bequeathed to my executors, upon certain trusts for the benefit of my niece [*name*], and her children, or more remote issue; and in lieu thereof I give and bequeath to such executors the reduced legacy or sum of £——, to be held by them upon the same or the like trusts, and to and for the same or the like intents and purposes, and subject to the same or the like powers, provisoes, and declarations, as in the said codicil are expressed or declared concerning the said legacy or sum of £——, so hereby reduced as aforesaid (*c*). And in all other respects I confirm my said will, and the said first and second codicils thereto. In witness, &c.

(*b*) This clause supposes that there are not various sets of legacies or provisions, to either of which this clause may apply.

Suggestion in regard to clauses of reference.

(*c*) It is often convenient, for the sake of brevity, to refer to the preceding matter of a will instead of repeating the terms in which the intention is there expressed; but, in framing such clauses of reference, care is to be taken that they do not give rise to a question, whether the testator means to adopt the whole or part only of the matter referred to. For instance (to put a case to which the writer's attention has been recently drawn), suppose a testator by his will to have bequeathed a legacy to A. for life, and, after his decease, to such persons as he shall appoint; and, in default of appointment, to his children; and that by a codicil the testator gives a legacy upon the same trusts for A. and his children as he has declared concerning the legacy bequeathed by the will. The question necessarily arises, whether the testator means to adopt the trusts in favor of A. and his children, *inclusively or exclusively of the power of appointment reserved to A.* But it would be vain to attempt to enumerate the various species of questions which arise out of this never-failing source of obscurity. A will maker should not insert a referring clause of this nature without first attentively perusing the matter referred to, and without taking special care that he has distinctly and unequivocally shewn that the whole, or, if less than the whole, how much of the subject-matter referred to is meant to be adopted. If the testator intends to adopt a part only, and such part is not susceptible of easy and obvious discrimination from the rest, it is better to abandon the proposed reference, and express the intention independently, as brevity is dearly purchased by a sacrifice of perspicuity.

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

CODICIL *contingently modifying* TRUSTS *in Will for the* SEPARATE *and* INALIENABLE *Use of a* FEMALE *during* FUTURE COVERTURE (*a*).

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, in and

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As to validity of restrictions on *future* coverture.

(*a*) In the discussion respecting the separate property of married women, in a former note, *ante*, p. 522, reference is made to the case of *Benson* v. *Benson*, 6 Simons, 126, (published while that note was passing through the press). In this case the question was, whether the trust in a prenuptial settlement for the separate use of the intended wife was confined to the then contemplated coverture. The Vice-Chancellor decided that it was so restricted by the terms of the settlement, and therefore the much agitated point regarding the validity of trusts for future coverture, though incidentally brought into discussion, remained unadjudicated. In the course of the arguments, Sir *L. Shadwell*, addressing himself to the counsel for the plaintiff, who contended for the invalidity of the trusts in question, said, "Suppose a father seised in fee devises to trustees and their heirs in trust for the separate use of an infant daughter, and she attains twenty-one and marries, could the husband file a bill against the trustees to have the legal estate conveyed to him, and so defeat the intention of the testator?"

Dicta of Sir *L. Shadwell*, in the case of *Benson* v. *Benson*.

Again:—"It is very important to persons having daughters and female relations for whom they wish to provide, and whose interests it may be necessary to protect, that the principle which you contend for should not be established until the subject has been well considered. Regard ought also to be had to the practice of conveyancers. As far as that practice goes, trusts like the present have prevailed for more than a century."

Upon the cases of *Newton* v. *Reid*, 4 Sim. 141, and *Massey* v. *Parker*, being cited, the Vice-Chancellor further observed:—"In *Brandon* v. *Robinson*, 18 Ves. 429, and 1 Rose, 197, Lord *Eldon* decided, that the clause against anticipation was inconsistent with the enjoyment of the property given, and was therefore void; but the question here is simply whether you can protect an unmarried woman in equity, by creating a trust for her separate use. *Newton* v. *Reid* did not interfere with that question. There the married woman and her husband combined to assign her separate property; and no one doubted that they might do so,

by my last will and testament, bearing date on or about the —— day of ——, I have given and bequeathed a legacy or sum of £—— to [*trustees*], of &c., UPON TRUST to lay out

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

unless they were prevented by the clause against alienation; and the decision only went to this, that the restriction on alienation was rendered ineffectual by the context of the will, but no opinion was expressed as to the effect or operation of the previous words."

It was then contended, that, supposing the trust in this case to be good, the marriage was in effect an assignment of the wife's property to the husband; on which the Vice-Chancellor remarked:—"That is not the law; for if the husband does not assign the chattels real of his wife during the coverture, they survive to her on his death. So, if the husband does not recover during the coverture the choses in action of his wife, they will not go to his executor, but survive to her; and, if she dies in his lifetime, he must take out letters of administration to her."

Remarks on *Benson* v. *Benson*.

It will be observed, that the Vice-Chancellor considers that his decision in *Newton* v. *Reid*, while it invalidates restrictions on alienation, leaves untouched trusts for separate use during future coverture. Indeed, his Honor's remark respecting the context of the will would seem to indicate that he regarded the case as altogether *sui generis*.

And certainly it does appear to be extremely difficult to support the trust for separate use, and deny validity to the restriction engrafted on the trust; for as such a restriction may unquestionably be applied to an *existing* coverture, it can only be invalid in reference to *future* coverture, on the ground of the repugnancy of *any* prospective provision against coverture to the interest of a feme sole, which principle it is evident would apply with equal force to both the restrictions in question.

It is not surprising, therefore, that the Master of the Rolls, cordially concurring, as he appears to have done, in the principle of the case of *Newton* v. *Reid*, should, in *Massey* v. *Parker*, on the strength of its authority, have made his bold and general attack on the validity of trusts for future separate use, in which it is conceived he merely pursued the principle of that case through its legitimate consequences. The Vice-Chancellor appears to be less confident in the soundness of his decision; and so strongly does he deprecate the conclusions drawn from it by the Master of the Rolls, that it seems highly probable, that, if he felt himself bound either to adopt those conclusions or surrender its authority, he would choose the latter branch of the alternative. In this state of things it is not too much to hope that these learned Judges will eventually agree in rejecting *Newton* v. *Reid* as a general authority, presenting, as it does, the only obstacle to a return to the doctrine—that a trust for the separate and inalienable use of a woman during future coverture is,

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

and invest the same in the manner therein mentioned, and to pay, apply, and dispose of the dividends, interest, and annual produce arising from the stocks, funds, and securities on which the said sum of £—— should be invested, unto and for the benefit of my only daughter [*name*], for her separate and exclusive use, free from the control and debts of any husband or husbands with whom she might intermarry, and so that my said daughter should have no power to assign or anticipate the said dividends, interest, or annual produce, or any part thereof; and from and after the decease of my said daughter, UPON TRUST that the said [*trustees*] should stand possessed of the said stocks, funds, and securities, and the dividends, interest, and annual produce thereof, upon the trusts therein expressed concerning the same. AND WHEREAS my said daughter is yet unmarried, and I am advised, that if she should be discovert at my decease or at any time afterwards, she may, during such discoverture, notwithstanding the restriction contained in the aforesaid trust, assign and dispose of the said dividends, interest, and annual produce so as aforesaid bequeathed in

Recital of bequest in will for separate and inalienable use of daughter.

And that doubts had arisen respecting the validity of the trust.

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unless defeated by an exercise of *the cestui que trust's aliening power while discovert*, valid and operative when the coverture takes effect.

Upon the whole, the draughtsman will probably see, in the recent observations of the Vice-Chancellor, no ground for departing from the course recommended at the close of the former discussion on this subject, *ante*, p. 525, namely, that he should engraft on every trust for *future* separate use a *cesser* proviso, framed in such a manner that, if the trust should prove to be effectual, the proviso shall leave it undisturbed.

The codicil in the text illustrates the superadding of such a proviso to a trust for separate use, contained in a will supposed to have been executed before the new doctrine was broached. In proportion, however, as the practitioner is sanguine of sustaining future trusts for separate use, he will attach less importance to the adoption of the second cesser proviso in the precedent in the text, which in that event would become inoperative. The only evil, however, occasioned by its unnecessary insertion would be the incumbering the will with so much useless matter, which seems to be the least of the inconveniences arising from the present embarrassing state of the law on this subject. It is unsatisfactory, at the close of a third discussion, to be compelled to leave an important practical point of this nature in a state of uncertainty.

trust for her; And I am also advised, that, according to the doctrine of certain recent adjudications of courts of equity, the hereinbefore-recited trust in my said will will be wholly inoperative and ineffectual to create a valid trust for the separate use of the said [*daughter*], exclusively of her husband, during any coverture or covertures which she shall or may contract subsequently to my decease: Now, THEREFORE, I hereby direct and declare, that if my said daughter shall at any time or times, whilst sole, assign or dispose of (except by such settlement or articles as hereinafter mentioned), or in any manner charge or anticipate the said dividends, interest, and annual produce, or any part thereof, for the whole period of her life, or for any part thereof, or if such dividends, interest, and annual produce, or any part thereof, shall (or but for this present proviso would) by any other means whatever become vested in or payable to any person or persons, other than the said [*daughter*], then and in every such case my said trustees or trustee for the time being shall thenceforth, for the residue of her life, apply the whole of such dividends, interest, and annual produce in such manner as they or he shall, in their or his uncontrolled discretion, think fit, for the benefit of all or any one or more, exclusively of the other or others of them my said daughter, and such other person or persons as would, under the trusts of my said will, be for the time being exclusively entitled thereto in case my said daughter were then dead (*a*). PRO-

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

Proviso for cesser in case of daughter assigning whilst discovert.

(*a*) It will be observed that the daughter, whose interest ceased under the proviso, is herself one of the objects in whose favour the trustees are authorized to apply the income. Her competency to take any benefit under it may by some be questioned. It may be thought, that any interest acquired by the daughter through the selecting power of the trustees, is to be regarded as a portion or remnant of the interest she derived under the prior trust, which she has already parted with, and that the attempt to restore to her any portion of such interest after her assignment is a fraud upon the assignee. It would be difficult to combat these objections, if the power were a mere power of regulating or modifying the shares of the objects (*i. e.* a power of distribution), and the daughter was one of those objects; but when it is considered that the power authorizes the total exclusion of the daughter, there seems to be strong ground to contend that the interest conferred by the act of the trustees in her favour constitutes a new and independent acquisition.

Remarks on the power given to the trustees by the clause in the text.

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

VIDED ALSO, and I further direct and declare, that if my said daughter (whether she shall be sole or married at the time

Similar proviso in case of any daughter or daughters marrying without settling the income.

This view of the matter supposes the assignment by the daughter not to embrace her future acquisitions under the power. An assignment extending to such acquisitions would, it is conceived, take from the trustees the power of applying any portion of the income in question to the benefit of the assignor, but would be of little value to the assignee, as it would not prevent the trustees from applying the whole to the other objects.

So, if the *cestui que trust*, whose interest is qualified by provisoes such as those in the text, becomes bankrupt or insolvent, possibly the Courts, with that jealous regard to the interests of creditors which has always characterized the judicial expositors of clauses of this nature (of which we have a recent instance in the case of *Piercy* v. *Roberts*, 1 Myl. & Kee. 4) would hold, that the trustees' discretion was so far determined by the bankruptcy or insolvency of the *cestui que trust*, that they could not confer any benefit on her under their power of application, which would not immediately become subject to the claims of her creditors, but who of course could not compel the trustees to exercise their discretionary power in her or rather in their favour.

Again, suppose the cesser-proviso to be called into operation by the daughter's marrying without making a settlement, a material question would then be, whether (assuming the doctrine of *Massey* v. *Parker* to be law) the trustees could defeat the marital claim by paying the income to the separate use of the wife. It is conceived that they might, by force of the principle already alluded to, namely, that the interest derived by the act of the trustees is to be regarded as a new and independent acquisition. In fact, the trustees would, in all probability, be able to obtain the assent of the husband to the income being so paid, by making it the condition of their applying *any* part for her benefit. Upon the whole, therefore, it appears to be expedient to vest a power of this nature in trustees, on the cesser-proviso taking effect, rather than wholly to exclude the offending *cestui que trust*, by creating an absolute trust in favour of any other persons, which is a harsher measure than a testator, who qualifies the interest of his legatee with such a proviso, commonly intends. He only wishes to carry his punitive infliction so far as to supply a sufficient motive to the observance of his restriction—a restriction, let it be remembered, imposed solely with a view to the benefit of the legatee herself. If it should be wished, however, instead of reserving a discretionary power of this nature to the trustees, to create an absolute trust for the ulterior objects, then vary the clause in the text as follows:—

"Then, and in every such case, my said trustees or trustee

CODICIL MODIFYING TRUSTS FOR FUTURE SEPARATE AND INALIENABLE USE.

of my decease) shall, at any time or times after my decease, marry, without having previously made or caused to be made an effectual settlement, or effectual articles for a settlement, to her separate use, without power of anticipation, of the said dividends, interest, and annual produce, for the whole of the joint lives of herself and the husband whom she shall so for the time being marry; and if by reason thereof, or of any other act or event whatsoever, the said dividends, interest, and annual produce, or any part thereof, shall become (or would but for this present proviso become) vested in or payable to any person or persons other than the said [*daughter*], then and in every such case my said trustees or trustee for the time being shall thenceforth, during her life, apply the said dividends, interest, and annual produce in such manner as they or he shall, in their or his uncontrolled discretion, think fit, for the benefit of all or any one or more, exclusively of the other or others of them my said daughter and such other person or persons as would, under the trusts of my said will, be for the time being exclusively entitled thereto, if my said daughter were then dead; and in all other respects I confirm my said will. IN WITNESS, &c.

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for the time being do and shall thenceforth, during her life, pay and apply the said dividends, interest, and annual produce unto the person or persons who would for the time being be entitled thereto under the trusts of my said will, if my said daughter were dead."

CODICIL REVOKING LEGACY TO BANKRUPT.

CODICIL REVOKING LEGACY *to one of Testator's Sons, who since the Will had become* BANKRUPT, *in case of his not obtaining his* CERTIFICATE, *and bequeathing the* LEGACY, *in that Event, upon Trusts for the Benefit of his* WIFE *and* CHILDREN.

Recital of will.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, by my said will, dated on or about the —— day of ——, I have bequeathed to each and every of my sons who shall be living at the time of my decease, the sum of £——, to be paid within three calendar months after my decease.

—Son's bankruptcy.

AND WHEREAS, since the execution of my said will, my son [*name*] has become bankrupt.

Conditional revocation of legacy given to son by the will, and bequest thereof upon trusts.

NOW, THEREFORE, in case it shall happen that, at the time of my decease, the said [*son*] shall not have obtained his certificate under the fiat of bankruptcy issued against him, or any other fiat of bankruptcy which may at any time hereafter be issued against him, I hereby revoke the legacy of £——, by my said will bequeathed to my said son [*name*] as aforesaid, and empower and direct the executors and trustees for the time being of my said will to pay and apply the said legacy or sum of £——, and the annual produce arising therefrom, or either of them, unto and for the benefit of the wife and children of my said son, or some or one of them, for such interest or interests, and with such conditions, provisoes, and restrictions, and in such manner in all respects as my said son shall direct or appoint; and in default of such direction or appointment, and subject thereto, and in the meantime until any such direction or appointment shall be made, then UPON TRUST to pay and apply the said legacy and the annual produce thereof, or so much of the said legacy and annual produce as shall not have been directed or appointed by my said son as aforesaid, unto and for the benefit of the wife

and children for the time being of my said son, in equal shares and proportions; and if there shall be only one of such objects, then unto and for the benefit of such only object [or unto and for the benefit of the said wife and children, or some or one of them, and in such proportions, for such interest or interests, and with such conditions, restrictions, and provisoes, and in such manner in all respects as the trustees or trustee for the time being of my said will, in their, his, or her discretion, shall think proper (*a*).] And I direct that in case my executors and trustees shall deem it to be expedient to invest the said legacy for the benefit of any of the objects of the aforesaid trusts, such investment shall be made either in the public funds or other government securities of Great Britain and Ireland, or on mortgage of freehold, copyhold, or leasehold estates in England; and I empower the said executors and trustees from time to time to vary the securities as often as shall be deemed expedient. And I also empower the said executors and trustees to give full and complete receipts and discharges for the moneys and securities paid or transferred to them by virtue of the trusts aforesaid And in all other respects I confirm my said will. IN WITNESS, &c.

CODICIL REVOKING LEGACY TO BANKRUPT.

CODICIL REVOKING DEVISE *in Will of* TRUST ESTATES *in regard to certain* PROPERTY, *and* DEVISING *such* PROPERTY *to other Devisees, who are also* APPOINTED LIMITED EXECUTORS (*b*).

CODICIL:—TRUST ESTATES AND LIMITED EXECUTORSHIP.

THIS IS A CODICIL TO THE LAST WILL and testament of me [*testator*], of &c. WHEREAS, by my

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(*a*) If it is not intended that the trustees shall have such a discretion, omit the clause in brackets. In some cases it would be advisable to provide for the event of there being no wife or child at the death of the testator.

(*b*) As to limited executorships, *vide ante*, p. 330.

CODICIL:—TRUST ESTATES AND LIMITED EXECUTORSHIP.

will, bearing date on or about the —— day of ——, I have devised all the estates and hereditaments vested in me as trustee to [*names*], therein described (being the trustees and executors of my said will), subject to the trusts affecting the estates and hereditaments respectively. And whereas I am the only surviving trustee and executor of the last will and testament of [*deceased testator*], late of ——, and, as such sole surviving trustee and executor, am seised and possessed of certain freehold, copyhold, and leasehold estates and hereditaments, upon the trusts and for the intents and purposes therein expressed concerning the same. And whereas I conceive that it will be advantageous to and agreeable to the wishes of the persons beneficially interested in the said last-mentioned estates and hereditaments, that the trusts of the said will which remain to be performed shall be executed and carried into effect by [*devisees*], of &c. Now, therefore, I hereby revoke the hereinbefore-recited devise contained in my said will, so far as respects the freehold, copyhold, and leasehold estates and hereditaments vested in me as such surviving trustee and executor of the will of the said [*deceased testator*] as aforesaid, or in either of such characters. And I give, devise, and bequeath the said freehold, leasehold, and copyhold estates and hereditaments, and every part thereof respectively, unto and to the use of the said [*devisees*], their heirs, executors, and administrators respectively, according to the nature and quality thereof, Upon trust that they the said [*devisees*], or the survivor of them, and the heirs, executors, and administrators of such survivor, do and shall, in all respects, fully and faithfully perform, fulfil, and execute the several trusts, duties, powers, and authorities which in and by the hereinbefore-recited will were vested in and confided to [*deceased trustee*], of &c., my late co-trustee, and me the said [*testator*], or such and so many of the same trusts, duties, powers, and authorities as shall, at the time of my decease, happen to be subsisting or capable of taking effect. And I hereby constitute and appoint the said [*devisees*] executors of my last will and testament so far as respects or concerns the estates and property vested in me as surviving trustee or executor of the will of the said [*deceased tes-*

tator] deceased, but no further or otherwise; and in all other respects I confirm my said will (*b*). In witness, &c.

CODICIL:—TRUST ESTATES AND LIMITED EXECUTORSHIP.

TESTAMENTARY APPOINTMENT *of a* Married Woman, *by Virtue of a* Power *in a* Settlement *in Favour of her* Husband *and* Children.

OF MARRIED WOMAN UNDER GENERAL POWER.

THIS IS THE LAST WILL AND TESTAMENT or testamentary appointment of me [*name*], the wife of &c. Whereas, under and by virtue of an indenture, bearing date on or about the —— day of ——, made between my father

Recital of settlement.

(*b*) The scheme, exemplified in this precedent, of a trustee transferring by his will the trust estates to persons specially selected for the purpose of carrying on the trusts affecting such estates, may often be adopted with great convenience and advantage. By the combined operation of the devise, and the appointment of executors quoad this particular property, the legal title to the real and personal estates in question will be absolutely vested in the testator's nominees, who therewith succeed to all the powers and authorities which the author of the trust has made incidental to such title. By means of the limited executorship, they, in respect of the trust property, become personal representatives of the original testator. The present disposition of the trust estates is made, not by virtue of any special authority to appoint new trustees created by the author of the trust, but of that general power of regulating the devolution of the trust estates on their decease, which trustees possess by means of and as incidental to the power of nominating their own representatives, of the exercise of which power every ordinary devise of trust estates affords an example. By such devise the testator merely substitutes the devisees for the heir, to whom the property would otherwise descend. What extent of fiduciary discretion and authority may happen to devolve to the devisees with the estate will of course depend upon the nature of the trust and the terms of the instrument creating it. Powers of appointing new trustees, as usually framed, would seem hardly to authorize a *testamentary* nomination by a sole surviving trustee, as it is the obvious intent of such clauses that the donee shall nominate his coadjutor, and not his successor. The form of a power extending to authorize a testamentary nomination, however, will be found in a former precedent. *Vide ante*, p. 558.

As to devises of trust estates.

OF MARRIED WOMAN UNDER GENERAL POWER.

[*name*], of &c., and myself, by my then name and description of [*wife's maiden name*], spinster, of the first part, the said [*husband*] of the second part, and [*trustees*], of &c., of the third part (being the settlement made previously to and in contemplation of the marriage which was afterwards duly solemnized between myself and my husband, the said [*husband*]), a sum of £—— Three Pounds per centum Consolidated Bank Annuities, then and now standing in the names of the said [*trustees*], as trustees thereof, was settled upon the trusts following, that is to say, IN TRUST during the joint lives of myself and my said husband from time to time to pay or permit to be received by me the said [*testatrix*], the dividends or annual proceeds of the said trust fund for my separate use, in manner in the said indenture mentioned; and from and immediately after the decease of either of them the said [*husband*] and myself, then and thenceforth, as to the said trust fund and the dividends and annual proceeds thereof, upon the trusts following, that is to say, if the said [*husband*] should die in my lifetime, then in trust to assign and transfer the said sum of £—— Three Pounds per centum Consolidated Annuities to me the said [*testatrix*], (then [*maiden name*]), my executors, administrators, and assigns, for my and their absolute benefit; but if I should die in the lifetime of the said [*husband*], then from and immediately after such my decease, as to the said trust fund, and the dividends or annual proceeds thereof, upon and for such trusts, intents, and purposes, and under and subject to such powers, provisoes, and declarations as I the said [*testatrix*] should, by any deed or deeds, instrument or instruments in writing, to be executed and attested as therein mentioned, or by my last will and testament, or any writing in the nature of a will, to be signed and published in the presence of and attested by two credible witnesses, direct or appoint. AND WHEREAS I have not hitherto exercised the power of appointment so reserved to me as hereinbefore mentioned. Now I the said [*testatrix*], in pursuance and by virtue and in exercise of the power to me for this purpose reserved or given in and by the hereinbefore-mentioned indenture of settlement, and of all other powers and authorities whatsoever enabling me in this behalf do, by this my last will and testament in writing, or

Bequest in exercise of power.

OF MARRIED WOMAN UNDER A GENERAL POWER.

instrument in the nature of a will, signed and published by me in the presence of and attested by the two credible persons whose names are hereunto subscribed as witnesses, direct and appoint, that in the event of my dying in the lifetime of my said husband, then and in such case the said [*trustees*], or the trustee or trustees for the time being of the aforesaid indenture of settlement, shall stand possessed of the said sum of £—— Three Pounds per centum Consolidated Annuities, or other the stocks, funds, or securities whereon the proceeds thereof shall for the time being be invested, and the dividends and annual proceeds arising therefrom from and immediately after such my decease as aforesaid, upon the trusts following, that is to say, UPON TRUST to pay unto or empower my said husband, the said [*husband*], or his assigns, to receive the said dividends and annual proceeds during his life; I direct and appoint, that after such his decease the said trustees or trustee for the time being shall stand possessed of the said stocks or funds, and the dividends and annual proceeds arising therefrom, IN TRUST for all and every my children and child by my said husband, who, being a son or sons, shall live to attain the age of twenty-one years, and who, being a daughter or daughters, shall live to attain that age, or shall previously marry, which shall first happen, equally to be divided between or among such children, if more than one, share and share alike; and if there shall be one such child only, then IN TRUST for such only child. And I hereby further direct and appoint, that, after the decease of my said husband, the annual income of the respective expectant portions of our said children who shall not then have acquired vested interests in their said respective portions, shall be applied for their respective maintenance and education during the interval which shall elapse previously to the vesting of their said expectant portions (*a*). And I further direct and appoint, that, if I shall have no child by my said husband, or, in case of my having any child or children, if they, he, or she shall die without having acquired vested interests or a vested interest in such portions or portion, then the said trustees or trustee for the time being shall stand possessed of the said stocks or funds,

(*a*) No power of advancement.

OF MARRIED WOMAN UNDER A GENERAL POWER.

and the dividends and annual proceeds thereof, after such my decease as aforesaid, IN TRUST for my said husband, his executors, administrators, and assigns, for his and their absolute benefit. AND I appoint the said [*trustees*] to be executors of this my will. *(Add usual powers of varying securities and nominating new trustees, unless these powers are contained in the settlement creating the power; and it is clear that they will apply to the trusts created by this appointment).* IN WITNESS, &c.

OF A MARRIED WOMAN UNDER A POWER OF SELECTION.

TESTAMENTARY APPOINTMENT *by a* MARRIED WOMAN *exercising a* POWER *of* SELECTION *in Favour of her* CHILDREN *and more remote* ISSUE, RESERVED *by her* MARRIAGE SETTLEMENT *over certain Trust* FUNDS; *and also a Power of bequeathing a* LIFE INTEREST *therein to her* HUSBAND, *substituting the* ISSUE *of Objects dying in Testatrix's Lifetime; if no Issue, then the others to take Shares of deceased Children.*

Recital of settlement creating power.

THIS IS THE LAST WILL AND TESTAMENT, or testamentary appointment, of me [*testatrix*], wife of [*husband*], of &c. WHEREAS, by an indenture of settlement, bearing date on or about the —— day of ——, made between my said husband [*name*], of the first part, me the said [*testatrix*], of the second part, and [*trustees*], of &c., of the third part, (being the settlement executed previously to my marriage with the said [*husband*]), it was declared and agreed, that the said [*trustees*], and the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of the said indenture, should stand possessed of the sum of £—— Three Pounds per centum Reduced Annuities, which had been then recently transferred into the names of the said [*trustees*], from and after my decease, IN TRUST for all or any one or more of the children thereafter to be born, or the grandchildren or

OF A MARRIED WOMAN UNDER A POWER OF SELECTION.

other issue of the said [*husband*] and me the said [*testatrix*], (such grandchildren or other issue to be born in the lifetime of me the said [*testatrix*]), for such interest or interests, either present or future, and in such parts, shares, or proportions, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such directions or regulations for maintenance, education, and advancement, and to be transferred or assigned at such age or ages, either absolutely or upon such contingencies, as I the said [*testatrix*] should at any time, or from time to time during my life, by any deed or deeds, to be executed and attested as therein mentioned, and to be made either with or without power of revocation and new appointment, or by my last will and testament, or any codicil or codicils thereto, to be respectively signed and published by me in the presence of and to be attested by two or more credible witnesses, direct or appoint; and in default of such direction or appointment, and subject to any appointment or appointments to be made under the same, which should not be a complete disposition of the whole of the said trust funds, then IN TRUST for the children of me the said [*testatrix*] and [*husband*], in equal shares, as therein mentioned. And in and by the same indenture it was declared, that, notwithstanding the trusts thereinbefore contained, it should be lawful for me the said [*testatrix*], by my last will and testament, or any writing in the nature thereof, to give and bequeath to the said [*husband*], my then intended husband, from and immediately after my decease, the dividends, interest, and annual produce of the said trust funds and premises, for any period not exceeding the term of his natural life. AND WHEREAS I have now by my said husband four children, namely, [*names*]. AND WHEREAS, in pursuance of a power contained in the said indenture of settlement, the said £—— Three Pounds per centum Reduced Annuities have been sold, and the proceeds arising therefrom have been laid out and invested in a mortgage of certain hereditaments in the parish of ——, in the county of ——, belonging to [*mortgagor*]. Now I the said [*testatrix*], by virtue of the said powers respectively reserved to me by the hereinbefore-recited indenture of settlement as aforesaid, and of all other powers enabling me thereunto, do by this my

Testatrix by virtue of power appoints that trustees of settlement shall stand possessed.

OF A MARRIED WOMAN UNDER A POWER OF SELECTION.

last will and testament or testamentary appointment, duly signed and published in the presence of and attested by two credible witnesses, direct, appoint, and declare, that, from and immediately after my decease, the trustees and trustee for the time being of the hereinbefore-recited indenture of settlement shall stand and be possessed of and interested in all and singular the funds and premises comprised therein, upon and subject to the trusts, intents, and purposes following, that is to say, UPON TRUST to pay the dividends, interest, and annual produce of the said trust funds and premises unto my said husband [*name*], or permit or empower him to receive the same during the term of his natural life; and immediately after the decease of my said husband, then as to, for, and concerning two equal seventh parts or shares of the said trust funds and premises, IN TRUST for my son [*name*] for his absolute use and benefit; and as to the remaining five equal seventh parts or shares thereof, IN TRUST for my four daughters [*names*], in equal shares and proportions, for their own respective absolute benefit; and in case my said daughters, or any or either of them, shall be under coverture at the time of the vesting in possession of her or their share or respective shares in the said trust funds and premises, such share or shares shall be for the separate use of such daughter or daughters respectively, exclusively of her or their husband or respective husbands; and her or their receipt or respective receipts, notwithstanding such coverture or covertures, shall be an effectual discharge or effectual discharges for the same. And in case any or either of my said sons or daughters shall die in my lifetime, leaving issue living at his, her, or their decease or respective deceases, who shall survive me and shall attain the age of twenty-one years, then I direct, appoint, and declare, that the said trustees or trustee for the time being shall stand possessed of the share of the child or each of the children of mine so dying in the said trust funds and premises, IN TRUST for such issue, if more than one, as tenants in common, such issue, through all the degrees, to take per stirpes and not per capita (*a*), the share or respective shares only which his,

Upon trust for her husband for life, and after her decease,

In trust for her children in certain specified shares.

Substitution of issue of children dying in testatrix's lifetime.

(*a*) See some observations on distribution per stirpes and per capita, *ante*, p. 181.

her, or their parent or respective parents, if living, would have been entitled to, the annual income arising from such share or respective shares during the minority or respective minorities of such issue to be applied for the maintenance and education of the minor or minors respectively to whom the same shall for the time being presumptively belong. And I also empower the said trustees and trustee, in their or his discretion, to apply any part of the capital of such share or shares, not exceeding in value or amount the sum of £—— sterling, in or towards the apprenticing or education, or otherwise for the advancement of the minor or minors to whom such share or shares shall presumptively belong as aforesaid. And in case any or either of them my said son and daughters shall die in my lifetime, without leaving issue who shall survive me, and shall live to attain the age of twenty-one years, then I direct, declare, and appoint, that the said trustees or trustee for the time being shall stand possessed of the share or respective shares, as well original as accruing, of my child or children so dying as aforesaid, in the said trust funds and premises hereby appointed, or so much thereof as shall not have been applied and disposed of under the power of advancement hereinbefore contained, upon such and the same trusts, and to and for such and the same intents and purposes as are hereinbefore expressed and declared concerning the other or remaining share or shares of and in the said appointed trust funds and premises, or upon, to, and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect (*b*). In witness whereof I the said [*testatrix*] have, to this my last will and testament or testamentary appointment, contained in this and the —— preceding sheets of paper, set my hand, this —— day of ——, in the year of our Lord 18—.

OF A MARRIED WOMAN UNDER A POWER OF SELECTION.

Signed and published by the said [*testatrix*] as and to be her last will and testament, in the presence of us. } [*Two Witnesses, whose descriptions should be inserted*].

(*b*) Property bequeathed by virtue of a power in favour of a prescribed class of objects is not liable to legacy duty, *ante*, Vol. 9, p. 523.

OF SEPARATE ESTATE OF A MARRIED WOMAN.

WILL *of a* MARRIED WOMAN DISPOSING *of her* SEPARATE PROPERTY (*a*), *consisting of* PERSONAL ESTATE. *(Short Form).*

I [*testatrix*], the wife of [*husband's name and addition*], being desirous of disposing of all the personal property which I am or shall at my decease be possessed of for my separate use independently of my said husband, or over which I have any disposing power, declare this to be my last will or testamentary disposition thereof in manner following; (that is to say); As my dear husband, in the event of his surviving me, will become absolutely entitled to a very considerable part of my family estate, I give and bequeath all the moneys, stocks, funds, and securities, and other personal estate and effects whatsoever and wheresoever, which I am or shall be possessed of for my separate use, and am enabled to dispose of by will or testamentary disposition, to the several persons, in manner and for the purposes, hereinafter mentioned. I direct, that my remains be interred in my family vault at ——, as near as possible to those of my deceased child [*name*], and that a neat marble monument be erected over my grave, with the following inscription "[*inscription*]." I empower my executors to pay and discharge any debts contracted by me, or claimed to have been contracted by me, at the time of my decease, whether such claimant or claimants shall have any valid lien upon or

Testamentary power of married women over separate roperty.

(*a*) Though formally prepared settlements usually reserve to married women in express terms a power of testamentary disposition over their property where such is the intention, yet they may dispose by will of personalty settled to their separate use without any such express authority. *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; S. C. 3 B. C. C. 8; *Rich* v. *Cockell*, 9 Ves. 346. And, according to the maxim, *partus sequitur ventrem*, this power extends to savings out of separate income: for, in the language of one of the early cases, "the sprout is to savour of the root, and to go the same way." *Gore* v. *Knight*, 2 Vern. 535. See also *Neal's case*, cit. Pre. Ch. 45.

OF SEPARATE ESTATE OF A MARRIED WOMAN.

remedy against my separate estate in respect thereof or not. I GIVE to my faithful servant [*name*], if she shall be living in my service at the time of my decease, my wearing apparel, except such part thereof as my executors shall deem to be unsuitable, which I request may be given to my friend [*name*], if she shall think proper to accept thereof, and to whom I also give my necklace, ear-rings, and my other trinkets. I request my dear husband to accept of my Bible and Prayer Book, and gold watch, as trifling tokens of my unalterable attachment and my sense of his unvarying kindness and affection. I GIVE to each of my nephews [*names*] the legacy or sum of £——, to be vested in and paid to them respectively at the age of twenty-one years, and in the meantime to be placed out at interest by my executors for their benefit respectively during their respective minorities, and the interest to be accumulated and added to the principal, and to follow the destination thereof, or to be applied in and towards their respective maintenance, as my executors, in their discretion, shall think most proper. I GIVE to each of my friends [*names*] the legacy or sum of £——, as a small mark of my affection and regard, to be paid within one calendar month after my decease. I GIVE to the minister and churchwardens of the respective parishes of —— and —— in the county of ——, where my estates are situate, out of such part of my personal estate as the law permits to be bequeathed for charitable purposes, the sum of £—— for each parish or place, to be by the minister and churchwardens of the respective parishes laid out in the purchase of fuel, clothes, meat, or bread, and distributed by them, in their discretion, amongst the poor of such parishes, at the Christmas following my death. And I direct, that the duty payable on the several legacies, as well specific as pecuniary, hereinbefore bequeathed, and all expenses attending the same, shall be paid and discharged out of my residuary personal estate (*b*). And after making the several payments, and satisfying the several bequests aforesaid, I direct that my executors shall stand possessed of the moneys, stocks, funds, and securities, and personal estate herein-

(*b*) Legacies bequeathed by a married woman under a *general* power, it is conceived, would be liable to legacy duty.

OF SEPARATE ESTATE OF A MARRIED WOMAN.

before bequeathed, UPON TRUST to pay the dividends, interest, and annual produce of the same to my two cousins [*names and descriptions*], for their respective lives, in equal shares, for their separate use, independently of their respective husbands for the time being, and so as not to be subject to the debts, control, or engagements of such husbands, and so also as not to be assigned or anticipated by my said cousins respectively; and after the respective deceases of them my said cousins, the principal of their respective shares to be equally divided among their respective children, if more than one, who shall live to attain the age of twenty-one years; and if but one such child, to such only child; and if either of my said cousins shall die without having any child who shall live to attain the age of twenty-one years, then as to the moiety or share of her so dying, IN TRUST for the other of them my said cousins and her child or children, in the same manner in all respects as her original share; and if neither of my said cousins shall have a child who shall live to attain the age of twenty-one years, then as to the whole of the said trust funds and premises, IN TRUST for the survivor of them my said cousins absolutely. AND I empower my trustees for the time being, at discretion, to apply an adequate portion of the income of the expectant share of any and every child of my said cousins respectively, who, at his or her mother's decease, shall be under age, for his or her maintenance and education during minority, and accumulate the unapplied part thereof, if any, in augmentation of the principal of the share whence the same shall have arisen; and I also empower the said trustees for the time being (with the consent in writing of the parent entitled to the prior life interest, if she shall be then living, and after her decease, in their or his own discretion) to apply any part not exceeding one half of the principal of each expectant share for the advancement in life of the child to whom such respective expectant share shall presumptively belong. And I declare, that my trustees shall not be obliged to inquire into the applicability of any other fund for, or the liability of any other person to provide, maintenance for the objects of the aforesaid trust. And I also empower the said trustees, in their discretion, to pay any of the moneys applicable to

OF SEPARATE ESTATE OF a MARRIED WOMAN.

maintenance as aforesaid to the parent or guardian for the time being of any minor for the purpose of being so applied, and such trustees shall not be bound to see to the application thereof. And I further empower the said trustees to invest any of the legacies or trust moneys upon government or real securities, and from time to time to convert into money any of the funds and securities vested in them, and lay out the proceeds thereof in government or real securities as aforesaid, and from time to time, at their discretion, to vary the same. AND I declare, that the receipts of my trustees for the time being for any moneys paid to them shall be effectual discharges for the same. And in case of any vacancy or vacancies occurring in the trusteeship, by reason of the death (either in my lifetime or after my decease), resignation, or incapacity of any trustee, then I declare that such vacancy or vacancies shall or may be supplied by the trustees or trustee for the time being, if any, and if there shall be no such trustee, then by the retiring or renouncing trustee or trustees, and in case of the want or refusal of such last-mentioned trustee, then by the executor or administrator of the deceased trustee, or, if more than one, of the survivor of the several deceased trustees. And I appoint the said [*trustees*] to be trustees and executors of this my will. IN WITNESS, &c.

Powers to trustees.

SUGGESTIONS OF INQUIRIES TO BE MADE OF TESTATORS.

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS.

INQUIRE what is the nature of the testator's property? If it comprises freehold, copyhold, or leasehold estates, are any of such estates in mortgage; and, if so, are the devisees or legatees to take cum onere; if not, out of what fund is the estate to be disencumbered?

Is the general residuary real or personal estate to be subject to a trust for conversion, or to remain in statu quo, and with any and what exceptions, (*e. g.* household domestic effects, and especially articles of consumption), and are the trustees to have any and what discretionary power to delay or suspend the conversion?

At what time are pecuniary legacies (if any) to be paid, and if not then paid, when to carry interest, and at what rate, and whether to be paid free from legacy duty?

If the legatee is a married woman, or a woman likely to marry, is the legacy intended for her separate use; if a minor, is it to be paid at majority, and in such case, is the interest in the meantime to be applied for maintenance, or how otherwise? If the legatee is lunatic or mentally imbecile, what (for there should be some) extraordinary powers are to be given to the trustees to apply the legacy for the benefit of the legatee?

If property is given on a contingency (whether that of the devisee or legatee attaining a specified age or any other event), what is to become of it, in the alternative event of the devisee or legatee dying under the vesting age, &c.?

SUGGESTIONS OF INQUIRIES TO BE MADE OF TESTATORS.

How are annuities to be raised and secured, whether by the charge or appropriation of a particular fund, or by the executors purchasing a government annuity or otherwise, when to commence, and at what intervals to be payable, and if intended to be free from legacy duty?

Is the widow to take any benefit given to her in lieu of dower?

What (if any) provision is to be made for the event of any legatee dying in the testator's lifetime, by substituting the children of the deceased, &c.?

What (if any) discretion is to be vested in trustees to pay unproved demands — waive doubtful rights of the testator—give indulgences to debtors—refer disputes to arbitration—and invest trust moneys in any and what securities (including the purchase of real estates). Some of these powers indeed, with others, should be inserted as a matter of course, without express instructions. Such are, powers to invest trust moneys on government or real securities, and vary securities—to apply the income of the shares of minors not otherwise provided for (especially of the testator's children) for their maintenance, and a definite portion of the principal for their advancement—to give full discharges for trust moneys received—and to supply vacancies in the trusteeship.

Without express instructions, too, the will-maker may devise the testator's trust and mortgage estates not specifically disposed of, and exercise his powers (if any) over the beneficial interest in real and personal estate; for inquiry on these points (which are of technical nature) would probably elicit imperfect information, and it is always to be remembered, that the hazard of redundancy is preferable to that of deficiency.

As the last, and not the least important precaution, the testator's solicitor should (if the will relates to freeholds) select as attesting witnesses three persons of respectability and intelligence, not being devisees or legatees, or the hus-

SUGGESTIONS OF INQUIRIES TO BE MADE OF TESTATORS.

bands of devisees or legatees, and such witnesses should subscribe their names in the testator's presence. If the will comprises personalty or copyholds only (there being no devise of freeholds either as beneficial owner or mortgagee or trustee), then it will be proper to have two such witnesses, though an attestation by witnesses is not *essential* to the validity of such a will.

It seems probable that the formalities attending the execution of wills will ere long undergo alteration from the legislature, one of the objects of the bill which lately passed the House of Commons being to establish an uniform rule in regard to the execution of all testamentary dispositions, including even appointments.

To many practitioners some of the preceding precautions will appear, and in fact will be, superfluous; but they will not the less readily assent to the propriety of the insertion of such matter for the use of their less experienced brethren.

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THE END.

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